Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA DEPARTMENT OF REVENUE,
Petitioner

versus

PILOT PETROLEUM CORPORATION
and
THE LOUISIANA AND EXPLORATION COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Title 28, **United States Code**, Section 1341, deprived the district court of jurisdiction to decide the questions of state taxation **sub judice** raised by the Taxpayer?

2. Whether the district court's decision to refrain from addressing questions concerning the constitutionality of an Alabama excise tax was proper under the doctrine of comity?

3. Whether the majority of the court of appeals correctly decided questions of Alabama law regarding an Alabama excise tax?

4. Whether a sale of gasoline by a distributor licensed by the State of Alabama to a distributor not licensed by the State of Alabama, which took place entirely within Alabama, was pre-empted from taxation by the State of Alabama due to the Export-Import Clause of the United States Constitution?

5. Whether the decisions of this Honorable Court referenced by the Court of Appeals in its decision were followed and properly applied by the majority of the court of appeals to the factual situation **sub judice**?

LIST OF PARTIES TO PROCEEDINGS BELOW

PLAINTIFF-APPELLEE Below:

The Louisiana Land and Exploration Company, a corporation,

DEFENDANT-APPELLANT Below:

Pilot Petroleum Corporation, a corporation,

INTERVENOR BELOW:

State of Alabama, Department of Revenue.

TABLE OF CONTENTS

Questions Presented i

List of Parties Below ii

Table of Authorities vi

Opinions Below 1

Jurisdictional Basis of Petition 1

Constitutional Provisions

And Statutes Involved 2

Statement of the Case 3

Argument 6

I. Title 28, **United States Code**, §1341, deprived the district court of jurisdiction to decide the questions of state taxation **sub judice** raised by the Taxpayer ... 6

II. The federal courts should have refrained from addressing questions concerning the constitutionality of the Alabama excise tax under the doctrine of comity 10

III. The majority of the court of appeals incorrectly decided questions of Alabama law regarding Alabama's gasoline excise tax 16

IV. The sale of gasoline which took place entirely within Alabama was not an

"export", and was not pre-empted from state taxation by the Import-Emport Clause of the U.S. Constitution 18

V. The decisions of this Honorable Court referenced by the Court of Appeals in its decision were not followed and were not properly applied to the factual situation **sub judice** by the majority of the court of appeals 23

Conclusion 28

Proof of Service 29

Appendices

A. Judgment of The United States Court of Appeals, Fifth Circuit, entered May 10, 1990 ..... 1a

B. Opinion and judgment of The United States District Court for The Eastern District of Louisiana, entered August 30, 1988 ..... 1b

C. Pilot Petroleum's "Exceptive Allegation and Answer." 1c

D. LL&E's Motion for Summary Judgment, Statement of Uncontested Facts, and Memorandum in Support of Motion for Summary Judgment. 1d

E. Pilot Petroleum's memorandum in opposition to LL&E's Motion for Summary Judgment and in support of Pilot's Motion for Summary Judgment, Statement of Material Facts, Motion for Summary Judgment 1e

F. LL&E's memorandum in opposition to Motion for Summary Judgement of Pilot Petroleum Corporation 1f

G. Verbatim of Article I, Section 10, Clause 2, U.S. Constitution 1g

H. Verbatim Text of Relevant Alabama Statutes 1h

I. Verbatim of 28 U.S.C. §1341 ..... 1i

TABLE OF AUTHORITIES

Page

California v. Grace Brethren Church,
457 U.S. 393, 102 S.Ct. 2498,
73 L.Ed. 2d 93 (1982) 9

Exxon Corp. v. Eagerton,
462 U.S. 176, 103 Sup. Ct. 2296 at 2305,
76 L.Ed.2d 497 (1983) 22

Fair Assessment in Real Estate Association v. McNary,
454 U.S. 100, 102 S.Ct. 177,
70 L.Ed.2d 271 (1981) 11, 12

Franchise Tax Board of California v. Alcan Aluminum Limited,
_____ v. _____, 110 S.Ct. 661,
107 L.Ed.2d 696
(decided January 10, 1990) 9

Lake Superior Consol. Iron Mines v. Lord,
271 U.S. 577 (1926) 22

Michelin Tire Corp. v. Wages,
423 U.S. 276, 96 S.Ct.
535 46 L.Ed.2d 495 (1976) ... 14, 21, 25, 26

Richfield Oil Corp. v. State Board of Equalization,
329 U.S. 69, 67 S.Ct. 156,
91 L.Ed. 80 (1946) 23-25

TABLE OF AUTHORITIES

Page

Rosewell v. LaSalle National Bank
450 U.S. 503, 101 S.Ct. 1221,
67 L.Ed. 2d 464, rehearing denied
451 U.S. 1011, 101 S.Ct. 2349,
68 L.Ed.2d 864 (1981) 7,9

United States Trust Co. of New York v. New Jersey,
431 U.S. 1 (1977) 22

Washington Revenue Department v. Stevedoring Association,
435 U.S. 734, 98 S.Ct. 1388,
55 L.Ed.2d 682 (1978) 14, 22, 26

Constitution and Statutes

Article I, §10, CL.2, U.S. Constitution,
Import-Export Clause ..... passim
Code of Alabama 1975, §40-12-191 20
Code of Alabama 1975, §40-17-31 18
Code of Alabama 1975, §40-17-32 ..... 13, 19
28 United States Code §1341 ..... passim

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, which is hereby sought to be reviewed was entered on May 10, 1990. This opinion appears in the Official Reports for the Fifth Circuit Court of Appeals at Volume 900, **Federal Reporter**, Second Series, at page 816 (900 F.2d 816 (5th Cir. 1990)), and is included herein as Appendix A.

The opinion and judgment of the trial court, the United States District Court for the Eastern District of Louisiana, Section B, the Honorable Chief Judge Fredrick J. R. Heebe presiding, was entered on August 30, 1988. This opinion and judgment does not appear in any official or unofficial report, but is included herein as Appendix B.

JURISDICTIONAL BASIS

The majority judgment of the United States Court of Appeals, Fifth Circuit, reversing the previous judgment and order of the United States District Court for the Eastern District of Louisiana, was entered on May 10, 1990. This Petition for Writ of Certiorari is filed within 90 days from the aforesaid date. The jurisdiction of this Honorable Court is conferred and invoked pursuant to 28 U.S.C. §1254(1), which governs the review of decisions by the courts of appeals, specifically a civil case after rendition of judgment by the United States Court of Appeals, Fifth Circuit.

The majority judgment of the United States Court of Appeals, Fifth Circuit, is either in direct conflict with or ignores the previous holdings of this Honorable Court in the cases of: **Rosewell v. LaSalle National Bank**, 450 U.S. 503, rehearing denied 451 U.S. 503, (1981); and, **Fair Assessment in Real Estate Association v. McNary**, 454 U.S. 100, (1981); so as to require an exercise of this Honorable Court's power of supervision.

Furthermore, the majority judgment of the Fifth Circuit Court of Appeals has clearly and erroneously misapplied the previous holdings of this Honorable Court in the cases of **Richfield Oil Corporation v. State Board of Equalization**, 329 U.S. 69, (1946); **Michelin Tire Corporation v. Wages**, 423 U.S. 276, (1976); and **Washington Revenue Department v. Stevedoring Association**, 435 U.S. 734, (1978), to the undisputed facts involved herein so as to necessitate an exercise of this Honorable Court's review of a decision of the Court of Appeals, Fifth Circuit. The decision which the Department of Revenue is urging this Honorable Court to review was conceded by the Court of Appeals to be a case of first impression concerning the Import Export Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

This petition involves the applicability of the Import Export Clause of the United States Constitution, article I, section 10, clause 2, to an excise tax imposed by the State of Alabama on the sale of gasoline (aviation jet fuel) by a distributor licensed to engage in such business by the State of Alabama to an unlicensed distributor, where the sale took place entirely within Alabama, but the gasoline was subsequently exported to Canada by the unlicensed distributor. The text of the Import-Export Clause is set forth in Appendix G. The applicable Alabama statutes concerning the need for persons engaging in the business of selling or distributing gasoline in Alabama to first obtain a license from the state, and imposing an excise tax on such sales or distributions are: Sections 40-12-191; 40-17-31(a), (d)(1), (e); 40-17-32; 40-17-36; and 40-17-38, **Code of Alabama 1975**. The applicable Alabama statutes are set forth in their entirety at Appendix H.

This petition also involves the applicability of 28 U.S.C. §1341, as it pertains to the jurisdiction of federal courts to determine questions regarding the collection of state taxes. The text of 28 U.S.C. §1341 is set forth at Appendix I.

STATEMENT OF THE FACTS

This case was originally submitted to the trial court on cross-motions for summary judgment. The material facts are not in dispute, and are uncontroverted. For the purposes of this petition, the Court of Appeals recitation of the facts must be considered sufficient.

"Pilot Petroleum Corporation (Pilot) contracted with the Louisiana Land & Exploration Company (LL&E) to purchase approximately 112,000 barrels of jet fuel oil (footnote omitted). On November 7, 1986, LL&E delivered the fuel free on board the Liberian flagged tanker, MARYANN, while it was anchored in the port of Mobile, Alabama. The fuel was then exported to Halifax, Nova Scotia, Canada. Following delivery, Pilot received two invoices for the purchase price of the fuel. The first invoice totalled $201,929.78, including $5,390.78 which was attributable to fuel tax. The second invoice charged $50,400.00 for fuel tax out of a total bill of $1,772,400.00. Pilot paid LL&E, excluding the amounts attributable to the Alabama state tax." (Opinion of the Court of Appeals, 900 F.2d at 817).

"In November, 1986, LL&E paid to the Alabama Department of Revenue the tax due as a result of its fuel sales to Pilot, despite the fact that it had not been paid the amount of the tax by Pilot. LL&E filed a petition for refund in August, 1987, which contended that Pilot was exempt from the tax under Alabama law because it was properly licensed and bonded. Alabama law provides that licensed distributors are exempt from the fuel excise tax (footnote omitted). Because Pilot did not become a licensed distributor until December 15, 1986, which was after the date of the fuel sale, the Department denied LL&E's request for refund (footnote omitted)." (Opinion of the Court of Appeal, 900 F.2d at 817).

"Pilot never reimbursed LL&E for the tax LL&E paid on its behalf. LL&E then filed this suit in the United

States District Court for the Eastern District of Louisiana. The district court concluded that the purchaser bears ultimate responsibility for the payment of taxes under both Alabama law and the LL&E-Pilot contract. The court further held that Pilot should first exhaust its administrative remedies by paying the tax and petitioning the Alabama Department of Revenue, and then file suit against the State of Alabama to challenge the constitutionality of the tax." (Opinion of the Court of Appeals, 900 F.2d at p. 818). Pilot then appealed to the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

The Respondents Pilot Petroleum Corporation and the Louisiana Land and Exploration Company are two corporations which are engaged **inter alia** in the buying and selling of gasoline. The Petitioner Alabama Department of Revenue is charged by Alabama law **inter alia** with the duty to collect state excise taxes due on sales of gasoline occurring within the jurisdiction of the State of Alabama.

On March 4, 1988, Louisiana Land and Exploration Company ("LL&E") filed a complaint in the United States District Court for the Eastern District of Louisiana against Pilot Petroleum Corporation ("Pilot") for $55,790.78, plus interest, attorneys' fees, and costs. The suit was based on two transactions between the parties whereby LL&E had sold to Pilot over 100,000 barrels of aviation jet fuel, which LL&E had delivered to Pilot Petroleum in Mobile, Alabama. Based on such sales to Pilot, LL&E reported and paid over to the Alabama Department of Revenue gasoline excise taxes, and according to the terms of the contract of sale, demanded reimbursement from Pilot Petroleum.

On May 2, 1988, in response to LL&E's complaint, Pilot filed an "Exceptive allegation and answer" averring **inter alia** that since "all allegations and claims asserted by

(LL&E) arise out of transactions in the State of Alabama and are subject to law of the State of Alabama" then "the Court is without personal jurisdiction over the claims asserted, and the Complaint should be dismissed for lack of jurisdiction ..." Pilot Petroleum's answer also contained a general denial to the allegations stated or otherwise mentioned in the complaint, but pointedly did not assert the Import Export Clause as a defense. (Pilot's answer is setforth herein at the conclusion as Appendix C.)

On July 12, 1988, LL&E filed a motion for summary judgment, and a memorandum in support of its motion with the U.S. District Court. (Setforth herein at the conclusion as Appendix D.) On July 26, 1988, Pilot filed a memorandum in opposition to LL&E's motion for summary judgment, as well as its own (cross) motion for summary judgment, along with a "statement of contested material facts." (All of Pilot's July 26, 1988, documents are setforth herein at the conclusion as Appendix E.) On August 2, 1988, LL&E filed a memorandum in opposition to Pilot's motion for summary judgment, along with a response to Pilot's statement of material facts. (Setforth herein at the conclusion as Appendix F.)

On August 10, 1988, after considering the pleadings, memoranda and arguments of the parties, the district court granted LL&E's motion for summary judgment and denied Pilot's, and on August 30, 1988 entered written reasons for its decision (Appendix B.) On August 31, 1988, the district court entered a judgment in favor of LL&E and against Pilot Petroleum in the amount of $55,790.78, together with interest and reasonable attorneys' fees.

On September 12, 1988, Pilot Petroleum filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. Both parties were allowed to file briefs according to the **Federal Rules of Appellate Procedure**, and did in fact file such appeallate briefs. The parties were also allowed an opportunity to orally argue their causes before a

three-judge panel of the Fifth Circuit. It was after such oral argument was conducted that the Attorney General of the State of Alabama was notified by the Fifth Circuit Court of Appeals that the applicability of the Alabama excise tax on gasoline had been called into question. At the invitation of the Court of Appeals, the State of Alabama Department of Revenue filed an appearance and brief as intervenor on July 20, 1989. Pilot Petroleum filed its response to the intervenor's brief on August 23, 1989.

On May 10, 1990, the United States Court of Appeals, Fifth Circuit, in a split-two-to-one decision, reversed the decision of the district court.

Each of the questions presented for review in this petition were presented to the Court of Appeals by the State of Alabama for consideration prior to the instant decision being reached by the Court of Appeals.

ARGUMENT

It is the position of the Alabama Department of Revenue that the majority decision of the three judge panel of the Fifth Circuit Court of Appeals is so obviously erroneous and contrary to all existant law regarding state taxation and the Import-Export Clause of the U.S. Constitution so as to require the exercise of this Honorable Court's supervisory and review powers. The questions raised by such a flawed decision, involving an issue which the Court of Appeals admitted was one of first impression, is of such wide spread importance so as to necessitate the attention of this Honorable Court.

I

WHETHER TITLE 28, UNITED STATES CODE, §1341, DEPRIVED THE DISTRICT COURT OF JURISDICTION TO DECIDE THE QUESTIONS OF STATE TAXATION SUB JUDICE RAISED BY THE TAXPAYER?

The majority decision of the Court of Appeals concluded: "the Alabama Fuel Tax is an impost upon an export within the meaning of the Import-Export Clause, and is therefore unconstitutional." It is the position of the Alabama Department of Revenue that the District Court properly refrained from addressing any questions raised by Pilot concerning the Alabama Excise Tax and its relationship to the Constitution, deciding instead to leave the resolution of such questions to the Alabama courts. Furthermore, 28 U.S.C. §1341 prohibited the District Court from entertaining questions concerning the constitutionality and applicability of a state tax. 28 U.S.C. §1341 provides:

> The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

The Department of Revenue submits that the language of 28 U.S.C. §1341, known as the Tax Injunction Act, is sufficiently clear in its meaning and should be easily understood. The Tax Injunction Act embodies a decision by Congress to transfer jurisdiction over a class of substantative federal claims, from the federal district courts to the state courts, so long as the state court procedures are "plain, speedy and efficient", and a final review of the substantative federal claims can be obtained in the United States Supreme Court. **Rosewell v. LaSalle National Bank**, 450 U.S. 503, rehearing denied 451 U.S. 1011, (1981).

As was pointed out to the Court of Appeals by the State of Alabama, the jurisdictional bar of 28 U.S.C. §1341 could not be avoided by challenging a state tax as being in violation of the U.S. Constitution. However, the Court of Appeals specifically rejected such arguments, and the Petitioner Alabama Department of Revenue would respectfully refer this Honorable Court's attention to the reasons given by the Court of Appeals in rejecting such jurisdic-

tional contentions. In its opinion, the Court of Appeals held:

> "In a strange twist, considering that the constitutionality of state laws or practices is a major part of the grist of federal district courts, the district court directed Pilot to pursue administrative remedies in the State of Alabama before raising any constitutional defense in the federal courts." 900 F.2d at 818.

The above expression of the rationale of the Court of Appeals is very revealing. It demonstrates that the majority of the Court of Appeals did not understand the scope and effect of the prohibition contained in 28 U.S.C. §1341. The Department of Revenue does not believe that the logic of the district court was so "strange" when one considers that unlike "the vast majority of those situations where state laws or practices may be grist for the federal courts," **in the present instance there is a specific statutory prohibition**, as well as an established long-standing policy, against the federal courts entertaining such actions. Furthermore, the "strange twist" observed by the Court of Appeals would seem positively bizarre, when one considers that **it was Pilot itself** who urged the federal district court that since "all allegations and claims asserted by (LL&E) in this action arise out of transactions in the State of Alabama and are subject to the law of the State of Alabama ... this action should be dismissed, for lack of subject matter jurisdiction over the claims asserted". (Pilot's Answer p. 1; Appendix C, p. 1c.)

A further example of the fallacious reasoning used by the majority in the Court of Appeal's decision on this point is found at 900 F.2d p. 818, wherein the majority held:

> The Tax Injunction Act does not bar federal court jurisdiction in this case, however, because this suit was filed to collect a state tax, rather than enjoin, suspend or restrain the collection of

> taxes. (Footnote omitted). Furthermore, LL&E chose to bring this suit in the Eastern District of Louisiana; and it cannot now limit Pilot's defenses.

The above statement by the majority of the Court of Appeals concerning the scope and effect of the Tax Injunction Act is directly contrary to numerous decisions of this Honorable Court which have repeatedly held that the principal motivating force behind the enactment of the Tax Injunction Act by Congress "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." **Franchise Tax Board of California v. Alcan Aluminum Limited**, ____ U.S. ____, 110 S.Ct. 661, 107 L.Ed.2d 696 (decided January 10, 1990); **California v. Grace Brethren Church**, 457 U.S. 393, (1982); **Rosewell v. LaSalle National Bank**, 450 U.S. 503, (1981). If the decision of the Court of Appeals is to be followed, the prohibition of 28 U.SC. §1341 can now easily be avoided by a taxpayer simply refusing to pay the tax, and forcing the collector of the tax to sue for the recovery of the tax. Such suit will then be considered appropriate for federal jurisdiction because it is a "suit to collect a state tax, not a suit to enjoin, suspend or restrain the collection of a state tax."

The very statement by the Court of Appeals that the "Tax Injunction Act does not bar federal court jurisdiction in this case ... because this suit was filed to collect a state tax, rather than enjoin, suspend or restrain the collection of taxes" is nonsensical. It simply does not make sense. It is especially illogical if you accept the Court of Appeals' repeated assertions that LL&E acted as an agent on behalf of the State of Alabama in the collection of the excise tax, and it was the State of Alabama's excise tax that was ruled unconstitutional.

It also must be emphasized that LL&E **did not** assert the Tax Injunction Act as a jurisdictional bar as the Court

of Appeals stated in justification of its decision to exercise jurisdiction. It is apparent the Court of Appeals was confused about the true posture of the case. It should have been evident that it would have been ridiculous for LL&E to have filed a complaint against Pilot and then to have asserted that the jurisdiction over its own complaint was barred by the Tax Injunction Act. It was not LL&E, but the Intervenor State of Alabama (who was brought into the action at the appellate level due to the insistence of Pilot) who asserted the Tax Injunction Act as a jurisdictional bar. However, the State of Alabama was not the only party who asserted the federal court's lack of jurisdiction over the questions pertaining to the legality of the Alabama tax. In its answer, Pilot also asserted as its defense that the district court did not have jurisdiction over questions of Alabama law!

The Department of Revenue submits that the language and intent of the Tax Injunction Act should be sufficiently clear so as to be readily understood. The prohibition contained in the Tax Injunction Act was intended to drastically limit the jurisdiction of federal courts to interfere with the assessment and collection of state taxes. It is apparent that the majority decision of the Circuit Court of Appeals has somehow misunderstood and avoided the clear congressional mandate intended by the adoption of the Act. Such an erroneous interpretation of the Tax Injunction Act should justify the granting of the Writ of Certiorari in the instant case.

II

WHETHER THE FEDERAL COURTS SHOULD HAVE REFRAINED FROM ADDRESSING QUESTIONS CONCERNING THE CONSTITUTIONALITY OF THE ALABAMA EXCISE TAX UNDER THE DOCTRINE OF COMITY?

Prior to the Court of Appeals rendering its decision in the present case, the State of Alabama, as Intervenor, urged the Court of Appeals that it was not only proper for the District Court to have refrained from addressing the state tax questions raised by Pilot on the basis of the statutory prohibition contained in 28 U.S.C. §1341, but also urged the Court of Appeals to abstain from such action based upon the principles of comity.

In the case of **Fair Assessment in Real Estate Association v. McNary**, 454 U.S. 100 (1981), the basic principles underlying the doctrine of comity as it relates to 28 U.S.C. §1341 and federal review of state tax administration were set forth. Justice Rehnquist, speaking for the majority of the Court in a unnanimous decision, held:

> Neither the legislative history of the Act nor that of its precursor, 28 U.S.C. §1342, suggests that Congress intended that federal court defference in state tax matters be limited to actions enumerated in those sections. (Citation omitted). Thus, the principle of comity which predated the Act was not restricted by its passage.
>
> C
>
> The post-Act vitality of the comity principle is perhaps best demonstrated by our decision in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Several Louisiana taxpayers brought an action in Federal District Court seeking a declaratory judgment that the state tax as applied to them was unconstitutional and void. Although §1341 was raised as a possible bar to the suit, as it has been raised in this case, "we [found] it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a

state tax." 319 U.S., at 299, 63 S.Ct. at 1073. Instead, "we [were] of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require[d] a like restraint in the use of the declaratory judgment procedure." Ibid. Those considerations were, of course, principles of federalism:

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief be denied in every case where the asserted federal right may be preserved without it." ... Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer ..." Id., at 298, 63 S.Ct., at 1073 (Matthews v. Rodgers, 284 U.S. at 525, 52 S.Ct at 219).

The Court's reliance in Great Lakes upon the necessity of federal-court respect for state taxing schemes demonstrates not only the post-Act vitality of the comity principle, but also its applicability to actions seeking a remedy other than injunctive relief. The focus was not on the specific form of relief requested, but on the fact that "in every practical sense [it] operate[d] to suspend collection of the state taxes until the litigation [was] ended. (Citation omitted). **Fair Assessment in Real Estate Association v. McNary**, 454 U.S., at 110.

That the majority decision of the Court of Appeals in the present case is intrusive there can be little doubt. Alabama, like all other states, has imposed an excise tax on the sale and distribution of gasoline taking place within its borders. One exception to the imposition of this tax is where one licensed distributor sells gasoline to another licensed distributor. See: Section 40-17-32, **Code of Alabama 1975**. The Court of Appeals' majority decision recognized this exception in the Alabama law in footnotes 5 and 6 of its Opinion. It goes without saying that under the revenue powers, as well as the police powers of Alabama, the State is authorized to tax and regulate such a volatile and energy precious commodity as gasoline. The Court of Appeals did not reject the Alabama scheme of taxation requiring those persons who engage in the business of selling gasoline to obtain a license from the State prior to engaging in such business on the ground that such requirement was an unreasonable or unconstitutional exercise of state powers.

Instead, the majority of the Court of Appeals has by its decision held that where a licensed distributor makes a sale of gasoline to an unlicensed distributor, such sale taking place entirely within Alabama, then the State of Alabama is prohibited from exercising any jurisdiction over such sale so long as the unlicensed distributor is buying the gasoline for export. This holding by the majority of the Court of Appeals will have a tremendous detrimental effect on the ability of the State of Alabama to regulate and tax the sale of gasoline. The effect of this decision is that so long as any person not licensed with the State of Alabama comes to Alabama and buys gasoline for export, then the unlicensed buyer would not have to observe any of Alabama's laws regarding the sale of gasoline, relying instead upon the Import-Export Clause. This drastic intrusion is certainly the type situation which the doctrine of comity is intended to address, and the Department of Revenue submits that the failure of the majority of the Court of Appeals to observe the previous pronouncements of the

Supreme Court regarding the doctrine of comity, and the necessity of federal courts to refrain from unduly intruding in state taxation, require the review of this Honorable Court. It is assumed that the previous decisions of the Supreme Court on the doctrine of comity were published for the purpose of providing guidelines to the various federal courts, and the Fifth Circuit Court of Appeals' failure to observe such guidelines can only result in unequal protection and inconsistent treatment under the law.

The Court of Appeals' decision to ignore the arguments of the State of Alabama regarding the applicability of the doctrine of comity is especially puzzling when one considers the pronouncements in the decision itself that although the Supreme Court had in the past refused to address the issues considered by the majority of the Court of Appeals as being material, the majority would still insist upon presenting their view of the Import-Export Clause and its relationship to the Alabama excise tax on gasoline, and to use this opportunity to announce the Court of Appeals theory concerning "the export stream".

After a somewhat lengthy discussion of the case of **Michelin Tire Corp. v. Wages**, 423 U.S. 276, (1976), and the relationship of this case to the Import-Export Clause, the Court of Appeals concluded: "Therefore, the **Michelin** Court left open the question of whether a tax on goods in transit would constitute an "impost" or "duty" under the Import-Export Clause." 900 F.2d at 820.

The majority of the Court of Appeals then considered the holding of this Honorable Court in the case of **Washington Revenue Department v. Stevedoring Association**, 435 U.S. 734, (1978), and concluded:

> The Court expressly refused to reach the issue now before us today: whether a state may directly tax imports or exports that are in transit. (900 F.2d at 820).

Since it is apparent the majority of the Court of Appeals recognized that the Supreme Court had previously refrained and "refused to reach the issue" before the Court of Appeals, it is difficult to understand the majority of the Court of Appeals' decision to ignore the doctrine of comity and to instead attempt to fathom "the contemporary view of the Supreme Court." 900 F.2d at 820. The Department of Revenue submits that it is in just such instances as are involved in the present action that the doctrine of comity would be most applicable. Certainly those courts of appeal which recognize that this Supreme Court has in the past refused to address the very questions raised in the proceeding before the federal court should not, in spite of such recognition, engage in speculation as to the "contemporary view of the Supreme Court" with regard to the Import-Export Clause.

The decision of the Court of Appeals in the present case establishes a radical precedent. In the present case a buyer of aviation fuel was allowed to challenge the constitutionality of an Alabama excise tax in federal court, rather than pursuing such remedy in state court as contemplated by both 28 U.S.C. §1341 and the doctrine of comity. This decision on the part of the majority of the Court of Appeals is even more difficult to understand when it is realized that the Court of Appeals recognized throughout its decision that the true parties in interest were Pilot and the State of Alabama:

> Even if Pilot had alternative adequate means to challenge the constitutionality of the Alabama tax, this case should be viewed primarily as a dispute between the State of Alabama and Pilot ... Because LL&E acts as a mere agent for the State in the collection of taxes, this suit, in effect, is between the state of Alabama and Pilot Petroleum. (900 F.2d at 818.)

It is the position of the Department of Revenue that once the Court of Appeals recognized that the true parties in the dispute were Pilot and the State of Alabama, then such recognition was all the more reason for the Court of Appeals to have given effect to the prohibition contained in 28 U.S.C. §1341, as well as adherred to the policy considerations of comity enunciated by the Supreme Court in its previous decisions. The Department of Revenue respectfully submits that this failure on the part of the Court of Appeals requires the exercise by this Honorable Court of its supervisory and review powers.

III

WHETHER THE COURT OF APPEALS CORRECTLY DECIDED QUESTIONS OF ALABAMA LAW REGARDING AN ALABAMA EXCISE TAX?

In the majority opinion portion of its decision, the Court of Appeals held:

> Yet, the Alabama Code allows refunds only to taxpayers who pay taxes directly to the Alabama Department of Revenue. (Footnote omitted.) Therefore, because Pilot does not pay the tax to the State of Alabama, it has no standing to pursue a refund of the tax paid by LL&E supposedly on Pilot's behalf. 900 F.2d at 818.

Not only does the above-quoted portion of the majority opinion of the Court of Appeals disclose its misunderstanding of Alabama law, but the verbatim quotation of the statute involved, which was included as a footnote by the Court of Appeals in its decision, clearly omitted and failed to state the applicable portion of the Alabama refund statute. In its argument to the Court of Appeals, Pilot made this very same argument that Pilot lacked standing to raise the issues regarding the constitutionality of the Alabama tax in an Alabama court because it did not pay taxes

directly to the Alabama Department of Revenue. In its brief to the Court of Appeals as Intervenor, the Department of Revenue addressed this very same argument by Pilot as follows:

> The State would address this argument by asking the following question: "Who made the decision that Pilot had no standing under Alabama law to exhaust any administrative remedy?"
>
> No where in the record has it ever been shown that Pilot even attempted to exhaust any remedy in Alabama. Pilot made this decision on its own not to seek any remedy from Alabama. Pilot has chosen to simply ignore LL&E's demand to be paid under its contract, and to offer as justification for such refusal the excuse that "the State of Alabama probably wouldn't grant Pilot any relief anyway." The State believes it is fair to say that until Pilot asks for administrative relief, none will be granted. **For the record, it is the State of Alabama's position that in fact Pilot could have been made a party to the administrative proceeding before the Department of Revenue.** The very statute upon which Pilot relies to support its position that it had no standing under Alabama law to petition for refund provides in part:
>
> > Before any refund under this section can be made, the taxpayer, his heirs, successors, **or assigns** shall file in duplicate a petition directed to the Department of Revenue, ... (Emphasis supplied). §40-1-34 **Code of Alabama 1975.**

Clearly Pilot could have requested LL&E to **assign** its rights to seek a refund to Pilot.

Furthermore, §40-17-31(e), **Code of Alabama 1975**, provides that when the "distributor, refiner, retail dealer or storer, or in the case of a licensed user, (collects the tax, it is) acting merely as an agent of the State for the collection and payment of the tax to the State". Thus, if Pilot should pay LL&E the excise tax in question, it must be considered as paying the tax directly to the Department of Revenue, since it paid said tax to an agent of the Department.
(Intervenor State of Alabama's Brief before the Court of Appeals, Fifth Circuit, pp. 28-29, emphasis in the original.)

IV

WHETHER A SALE OF GASOLINE BY A DISTRIBUTOR LICENSED BY THE STATE OF ALABAMA, TO A DISTRIBUTOR NOT LICENSED BY THE STATE OF ALABAMA, WHICH TOOK PLACE ENTIRELY WITHIN ALABAMA, WAS PREEMPTED FROM TAXATION BY THE STATE OF ALABAMA DUE TO THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION?

At the outset it is crucial to understand that the Alabama excise tax at issue is not collected on an export! Based upon the undisputed facts, LL&E, an Alabama licensed distributor, withdrew from its inventory and sold aviation gasoline in Alabama to Pilot, an unlicensed distributor. This is the transaction which was subject to the Alabama tax! The gasoline was **then exported** by Pilot to Canada. The transaction which was subject to the Alabama tax occurred entirely within the borders of Alabama. In order to determine the true essence of the transaction, one simply has to ask the following questions: "Who was the exporter?" The answer is of course that Pilot was the

exporter when Pilot delivered the gasoline in question to Canada to complete the sale to its customer. "Did LL&E export anything?" The answer is: "Of course not." The sale from LL&E to Pilot was not an "export". The fact that it was delivered to a foreign flagged vessel at Pilot's direction would not make the sale by LL&E to Pilot an export.

"When was the gasoline exported?" The Department of Revenue submits that the answer to this question is: "When the gasoline was shipped by Pilot to its Canadian customer". As such, Alabama's taxation of the sale by LL&E to Pilot did not constitute an invalid exercise under the Import-Export Clause of a state's power to tax. The Department of Revenue concedes, as it did to the Court of Appeals, that the sale by Pilot to its Canadian customer was not subject to any Alabama tax pursuant to the provisions of the Import-Export Clause.

Under Alabama law sales between licensed distributors of gasoline are exempt from the excise tax on gasoline. Section 40-17-32, **Code of Alabama 1975**, manifests a clear intent on the part of the Legislature of Alabama that only sales between **licensed** distributors are exempt from the payment of the gasoline excise tax. Section 40-17-32 provides in part:

> The excise tax imposed by §40-17-31 shall be collected by persons, as defined in this article, storing gasoline or distributing the same or allowing the same to be withdrawn from storage, ... provided, that receipts by any **licensed distributors** or storers **from another licensed distributor** or storer shall be treated on the same basis as gasoline received or distributed **by such licensed distributors** or storers in interstate commerce. (Emphasis supplied).

There are numerous provisions within the Alabama Gasoline Excise Tax Law which indicate that only those persons who are licensed with the Alabama Revenue

Department as distributors are entitled to make purchases of gasoline tax free.

Section 40-12-191, **Code of Alabama 1975**, provides in part:

> Every distributor **before engaging in the business** of selling, distributing or withdrawing from storage gasoline in this state, **shall first make application to the Department of Revenue upon forms prepared by the department of revenue, for a license to engage in said business.** (Emphasis supplied).

Section 40-12-191 clearly requires every distributor to be licensed **prior** to engaging in the business of a dealer in gasoline in Alabama.

In the instant case, Pilot, **by failing to obtain a license as a gasoline distributor** prior to engaging in the business of dealing in gasoline in Alabama failed to comply with the applicable provisions of the Alabama Gasoline Excise Tax Law. Therefore the withdrawal of gasoline from storage by LL&E, and the subsequent sale to Pilot, an unlicensed distributor, must be considered a taxable transaction which took place solely within Alabama. Under Alabama law, it was the transaction between LL&E and Pilot, and **NOT** between Pilot and Pilot's Canadian customer, which must be considered the taxable transaction. No foreign customer was involved in the Alabama transaction. The transaction was completely an intrastate occurrence which took place entirely within the borders of Alabama.

The Court of Appeals' decision completely ignored this aspect of Alabama's scheme of taxation. The very question the Court of Appeals chose to address in its decision reveals the basic flaw in the logic of the majority decision:

> The question this case presents is whether the state of Alabama may tax jet fuel, which is sold for export to a foreign country. (900 F.2d, at 817.)

The Department of Revenue respectfully submits that the Court of Appeals, by framing the question as stated above, completely missed the mark with respect to whether the transaction in question was subject to an Alabama tax. The more proper question to ask would have been whether Alabama may tax a transaction which takes place entirely within its borders. "May the State of Alabama tax a sale of gasoline to an unlicensed distributor, where the gasoline is ultimately exported by the unlicensed distributor?" It is the position of the Department of Revenue that such taxation on the part of the State of Alabama is not prohibited or in any manner prevented by the Import-Export Clause.

The majority decision of the Court of Appeals in the present case sets a new and radically different standard than any seen so far. Previously, it was determined that at a certain point and place in time a specific transaction could be considered an export. However, under the majority opinion of the Court of Appeals, goods are now to be considered "in the stream of export." (900 F.2d, at 821.) Under the present decision of the Court of Appeals, the person making the sale to the person actually engaged in exporting the goods in question is now considered exempt from state taxation under the Import-Export Clause. One logically has to ask "Where does the 'stream of export' begin and end?" Is the person who sells goods to the person who sells the same goods to the person exporting the goods also exempt from taxation, since the goods themselves will ultimately be exported? The Department of Revenue sees no logical answer to the problems raised by the majority decision of the Court of Appeals.

Certainly the adoption this new standard concerning the relationship between state taxation and the Import-Export Clause would now become a matter of private contract, as is the situation presently under consideration, rather than applying the standards and tests previously followed by this Honorable Court in such cases as **Michelin Tire**

Corp. v. Wages, 423 U.S. 276, (1976) and **Washington Revenue Department v. Stevedoring Association**, 435 U.S. 734, (1978). The majority of the Court of Appeals tacitly recognized that this new standard would allow parties to a private contract to be able to call into question the constitutionality of a state tax:

> Although it was probably never in the contemplation of these parties that they were facing or were even close to a constitutional problem which goes back to the very formation of this new nation, the contract provides that Pilot must pay only taxes that are 'legally required to be paid'. This language necessarily calls into question the constitutionality of the Alabama tax. 900 F.2d, at 819.

The Supreme Court has time and again held that the parties to a private contract cannot limit a state's ability to levy taxes or to select upon whom these taxes shall fall. **Lake Superior Consol. Iron Mines v. Lord**, 271 U.S. 577 (1926); **United States Trust Co. of New York v. New Jersey**, 431 U.S. 1 (1977). One whose rights, are subject to state restrictions, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. **Exxon Corp. v. Eagerton**, 462 U.S. 1976, (1983). Admittedly, these cases deal with an interpretation of the Contract Clause contained in the U.S. Constitution. However, it is also clear that if the majority opinion of the Court of Appeals is adopted, then such parties as a seller of gasoline and a buyer of gasoline could restrict the State's power to tax a sale of gasoline taking place entirely within its own borders by simply "contracting" that such goods would ultimately be exported and therefore removed from State taxation. This radical new concept with regard to sales taking place entirely within a state, which were previously within the subject matter jurisdiction of the

State itself, and the power of private parties to contract away a State's soverign power to tax such transactions must of necessity require the review of this Honorable Court.

V

WHETHER THE DECISIONS OF THIS HONORABLE COURT REFERENCED BY THE COURT OF APPEALS IN ITS OPINION WERE PROPERLY APPLIED BY THE MAJORITY OF THE COURT OF APPEALS TO THE FACTUAL SITUATION SUB JUDICE?

The decision of the Court of Appeals, which the Alabama Department of Revenue is petitioning this Honorable Court to review, mentions only three cases to support its holding that the Alabama excise tax in question violates the Import-Export Clause of the Constitution. It will be obvious from a reading of not only the Court of Appeals' citation of these cases, but also the cases themselves, that none of these decisions relied upon by the majority of the Court of Appeals to support its conclusion are in fact applicable to the factual situation involved herein.

RICHFIELD CASE

The first case mentioned by the Court of Appeals in its opinion is the case of **Richfield Oil Corp. v. State Board of Equalization**, 329 U.S. 69, (1946). As stated in the Court of Appeals' opinion, this very same decision was relied upon by Pilot in its appearance before the Court of Appeals. As the State argued to the Court of Appeals, an examination of the facts contained in the **Richfield** case, clearly demonstrates that the facts of the case are not analogous to the facts involved in the present action. It is clear that the transaction under consideration in **Richfield** was the sale between Richfield and its foreign New Zealand customer.

However, as the undisputed facts involved herein established, the transaction which causes the Alabama excise tax to be due in the situation presently under consideration is the withdrawal of untaxed jet fuel by LL&E, a licensed distributor, from its inventory located in Alabama, and the subsequent distribution of said gasoline in Alabama by sale to Pilot, an unlicensed distributor. In other words, in the present situation, the sale between LL&E and Pilot is "one-step back up the line" from the factual situation contained in **Richfield**. By way of analogy, Alabama could be considered as collecting the tax from the distributor who sold the fuel to Richfield, assuming Richfield was an unlicensed distributor in Alabama.

In the **Richfield** case, California attempted to place its tax upon the exportation of the fuel itself. In fact the transaction in **Richfield** involved a sale by Richfield to New Zealand, f.o.b. Los Angeles; whereas in the present situation, the excise tax was based upon the transaction between LL&E and Pilot, f.o.b. Mobile, Alabama. In the **Richfield** case, the foreign customer, New Zealand, took title to the fuel in Los Angeles. In the present factual situation, Pilot took title from LL&E in Mobile, Alabama. Furthermore, in **Richfield**, title passed to the foreign customer when it was delivered to the customer by Richfield in Los Angeles. However, under the factual situation involved herein, title passed from LL&E to Pilot in Mobile, Alabama. Title to the jet fuel did not pass from Pilot to its foreign customer until the fuel was delivered at the Canadian ports. The title to the fuel in question passed from LL&E, not to a foreign customer, but to Pilot. The sale by LL&E was not in foreign commerce, and as such, cannot be considered to be an export by LL&E. It is important to remember that title passed from LL&E to Pilot entirely within Alabama, and as such, was subject to the applicable Alabama excise tax laws.

MICHELIN CASE

The majority on the Court of Appeals never specifically held that the decision in the **Richfield** case, supra, was controlling with regard to the factual situations involved herein, the Court of Appeals simply stated: "Richfield has never been overruled by the United States Supreme Court." The Appellate Court then began a discussion of the case of **Michelin Tire Corp. v. Wages**, 423 U.S. 276, (1976). The discussion of the **Michelin** case by the Court of Appeals begins at 900 F.2d, p. 819. It is difficult to understand exactly why the Court of Appeals even mentioned the **Michelin** case, since admittedly the factual situation involved herein would pass the three-prong **Michelin** test. Furthermore, the Court of Appeals specifically ruled that the holding of the **Michelin** case "left open the question of whether a tax on goods in transit would constitute an "impost" or "duty" under the Import-Export Clause. (900 F.2d at 820).

The Department of Revenue has speculated as to the reasons the Court of Appeals even referred to the **Michelin** case, since the Alabama excise tax so clearly passes all of the requirements of the **Michelin** test. The question remains: "If the **Michelin** test was not applicable to the fact situation involved in the present case, then why did the majority of the Court of Appeals choose to cite it?" The only answer that comes readily to mind is that the **Michelin** case was cited for the purpose of explaining the evolution of the Import-Export Clause in order to explain the Court of Appeals' subsequent conclusion with regard to the "contemporary view of the Supreme Court" on a matter "that has never been previously addressed." 900 F.2d at 820.

WASHINGTON STEVEDORING CASE

The final case relied upon by the Court of Appeals was the case of **Department of Revenue of the State of**

Washington v. Association of Washington Stevedoring Co., 435 U.S. 734, (1978). (900 F.2d at 820). The Court of Appeals recognized that the Supreme Court in the **Washington Stevedoring** case held that a tax on income received from stevedoring activities did not violate the prohibition contained in the Import-Export Clause, using the **Michelin** three-prong policy test. However, the Court of Appeals held:

> Although the Court found that the Washington tax did not disturb any of the three policies of the Clause, it still had to address the fact that the stevedoring activities were taxed while the exported and imported goods were in transit. Thus, the U.S. Supreme Court was faced with the question of whether a business and occupation tax on activities related to in-transit imports and exports violates the Import-Export Clause. Because of the indirect nature of the tax, i.e., the tax did not relate to the value of the goods, the Court refused to discard the Michelin approach merely because the goods were in-transit. The Court expressly refused to reach the issue now before us today: whether a state may directly tax imports or exports that are in transit. (Citation omitted). 900 F.2d, at 820.

Thus the Court of Appeals recognized that in the past the Supreme Court has expressly refused to reach the issue which the Court of Appeals chose to address. The Court of Appeals instead held that under its "contemporary view" of the Supreme Court, this Honorable Court would in fact hold the Alabama tax as being violative of the Import-Export Clause.

COURT OF APPEALS CONCLUSION IS ERRONEOUS

The Court of Appeals concluded that the Alabama excise tax would be in violation of the Import-Export

Clause because: (1) Alabama's excise tax on fuel adversely effects United States foreign commerce with respect to a very important commodity; (2) coastal states which possess ports like the Port of Mobile, Alabama, derive significant amounts of revenue from this tax, since they are able to tax the large quantitites of fuel that are pumped from their port into tankers; and (3) the Alabama Fuel Tax in this case is a tax that is levied on the goods themselves while they are in transit. The Department of Revenue is confident that upon closer examination, this Honorable Court will determine that each of the reasons offered by the Court of Appeals in support of its conclusions are in fact illogical and contrary to reality. As stated above, there has been no explanation whatsoever offered by anyone, including the Court of Appeals, to explain how Alabama's excise tax adversely affects United States foreign commerce. It has repeatedly been conceded that if Pilot had in fact complied with the applicable Alabama laws prior to engaging in the business of a dealer in Alabama, then the sales from LL&E to Pilot would have been exempt. The fact that Pilot chose "to put the cart before the horse" and not comply with Alabama laws could not be considered as having any more of an adverse effect on foreign commerce than requiring other business entities to comply with applicable state laws before engaging in any business regulated by an individual state. Furthermore, the fact that Alabama has a port and is a coastal state could in no way be considered as being the cause for Pilot not having complied with the laws of Alabama prior to engaging in the business of a gasoline dealer in Alabama. No "significant amounts of revenues from this tax are realized simply because Alabama is a coastal state." Finally, the fuel tax in this case is not a tax on the goods themselves while they are in transit. This conclusion is at the heart of the Court of Appeals' majority decision. When LL&E delivered the gasoline in question into the tanks of a foreign flagged tanker at Pilot's direction, the goods were not "in transit in foreign com-

merce." The gasoline was not the subject of foreign export at the time of taxation.

CONCLUSION

For the reasons stated, and because the Court of Appeals decided this case of first impression in conflict with previous decisions of this Honorable Court, the questions presented are so substantial as to require plenary consideration, with briefs on the merits, and oral argument, for their resolution.

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COUNSEL FOR PETITIONER
ALABAMA DEPARTMENT OF REVENUE

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ALABAMA DEPARTMENT OF REVENUE,

Petitioner

versus

PILOT PETROLEUM CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PROOF OF SERVICE

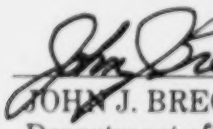
I, John J. Breckenridge, an attorney for the Alabama Department of Revenue, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of August, 1990, I served copies of the foregoing Jurisdictional Statement on all parties required to be served, as follows:

1. On Respondent herein, Pilot Petroleum Corporation, by depositing a copy in the United States mail, properly addressed and with first-class postage prepaid addressed to their attorneys of record, as follows:

Robert B. Dean, Esq. and Douglas L. Grundmeyer, Esq. of CHAFFE, MCCALL, PHILLIPS, TOLAR & SARPY, 2300 Energy Center, 1100 Poydras Street, New Orleans,

Louisiana, 70163-2300; and

2. On Respondent herein, Lousisiana Land and Exploration Company by depositing a copy in the United States mail, with first-class postage prepaid, addressed to Katherine Goldman, Esq. and John F. Landrum, Esq., of MILLING, BENSON, WOODWARD, HILLYER, PIERSON & MILLER, Suite 2300, 909 Poydras Street, New Orleans, Louisiana 70112, by depositing same in the United States mail, properly addressed and with first-class postage prepaid on the 7th day of August, 1990.



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APPENDIX

APPENDIX A

THE LOUISIANA LAND AND EXPLORATION COMPANY,

Plaintiff-Appellee,

v.

PILOT PETROLEUM CORPORATION,

Defendant-Appellant.

No. 88-3662.

United States Court of Appeals,
Fifth Circuit.

May 10, 1990.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, WILLIAMS, and JOLLY, Circuit Judges.

BROWN, Circuit Judge:

The question this case presents is whether the state of Alabama may tax jet fuel, which is sold for export to a foreign country. Pilot Petroleum Corporation argues that the Alabama tax[1] violates the Import-Export Clause[2] of the United States Constitution. The district

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[1]Alabama law provides: Every distributor, refiner, retail dealer, storer or user of gasoline or any substitute or device therefor sold for use as a fuel to propel aircraft shall collect and pay over to the state department of revenue an excise tax in accordance with the following schedule upon the selling, use or consumption, distributing, storing or withdrawing from storage in this state for use as a fuel to propel aircraft: ... b. Any fuel used to propel aircrat powered by jet or turbine engines shall be taxed at the rate of nine-tenths one cent per gallon.
ALA. CODE § 40-17-31(d)(1) (1975).

[2]The Import Export Clause states: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws ..."
U.S. CONST. Art. I, § 10, cl. 2.

court granted the Lousisiana Land & Exploration Company's motion for summary judgment. After this court certified to Alabama's attorney general that the constitutionality of its excise fuel tax had been drawn in question,[3] in response to which we sought and obtained extensive briefs, the state of Alabama intervened. We hold that the tax is unconstitutional and we reverse the decision below.

How It All Came About

Pilot Petroleum Corporation (Pilot) contracted with the Louisiana Land & Exploration Company (LL&E) to purchase approximately 112,000 barrels of jet fuel oil.[4] On November 7, 1986, LL&E delivered the fuel free on board the Liberian flagged tanker, MARYANN, while it was anchored in the port of Mobile, Alabama. The fuel was then exported to Halifax, Nova Scotia, Canada. Following delivery, Pilot received two invoices for the purchase price of the fuel. The first invoice totalled $201,929.78, including $5,390.78 which was attributable to fuel tax. The second invoice charged $50,400.00 for fuel tax out of a total bill of $1,772,400.00. Pilot paid LL&E, excluding the amounts attributable to the Alabama state tax.

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[3]Pursuant to federal law: In any action, suit, or proceeding in a court of the United States to which a State ... is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.
28 U.S.C. § 2403(b).

[4]Pilot first contacted Karbon Corporation, a petroleum products broker, for the purpose of purchasing jet fuel. On November 4, 1986, Karbon transmitted to LL&E a telex confirming the sale by LL&E to Pilot of approximately 100,000 barrels of jet fuel at the price of .4100 cents per gallon. On November 7, Karbon sent a second telex confirming the sale of approximately 12,000 barrels at .4375 cents per barrel.

In November, 1986, LL&E paid to the Alabama Department of Revenue the tax due as a result of its fuel sale to Pilot, despite the fact that it had not been paid the amount of the tax by Pilot. LL&E filed a petition for refund in August, 1987, which contended that Pilot was exempt from the tax under Alabama law because it was properly licensed and bonded. Alabama law provides that licensed distributors are exempt from the excise fuel tax.[5] Because Pilot did not become a licensed distributor until December 15, 1986, which was after the date of the fuel sale, the Department denied LL&E's request for refund.[6]

Pilot never reimbursed LL&E for the tax LL&E paid on its behalf. LL&E then filed this suit in the United States District Court for the Eastern District of Louisiana. The district court concluded that the

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[5]Section 40-17-32 provides in part: The excise tax imposed by 40-17-31 shall be collected by persons, as defined in this article, storing gasoline or distributing the same ... provided, that receipts by any licensed distributors ... shall be treated on the same basis as gasoline received or distributed by such licensed distributors in interestate commerce.
ALA. CODE § 40-17-32 (1975).

[6]Prior to delivery, Pilot contacted the Alabama Department of Revenue to obtain information regarding the requirements imposed by Alabama law which would apply to the sale. Pilot obtained a bond as required by the Revenue Department on December 3, 1986. Pilot also applied to obtain a gasoline license per the Department's directives. However, Pilot was later informed by the Department that the license application was defective. Pilot filed a corrected application and received its license on December 15, 1986.

Alabama law provides that sales between licensed distributors are exempt from the fuel excise tax. LL&E was licensed by the state of Alabama to sell and export gasoline products from Alabama.

Had Pilot obtained its license before or on the date of the sale in question, the issue of the constitutionality of the state fuel tax would not be before us today.

purchaser bears ultimate responsibility for the payment of taxes under both Alabama law and the LL&E-Pilot contract. The court further held that Pilot should first exhaust its administrative remedies by paying the tax and petitioning the Alabama Department of Revenue, and then file suit against the state of Alabama to challenge the constitutionality of the tax. Pilot appeals.

District Court Had Jurisdiction to Examine Constitutionality

In a strange twist, considering that the constitutionality of state laws or practices is a major part of the grist of federal district courts, the district court directed Pilot to pursue administrative remedies in the state of Alabama before raising any constitutional defense in the federal courts. Yet, the Alabama Code allows refunds only to taxpayers who pay taxes directly to the Alabama Department of Revenue.[7] Therefore, because Pilot does not pay the tax to the state of Alabama, it has no standing to pursue a refund of the tax paid by LL&E supposedly on Pilot's behalf.

In addition, LL&E claims that the district court was barred from deciding the tax's constitutionality based on the Tax Injunction Act.[8] The Act forbids federal district courts from "enjoining, suspending or restraining the assessment, levy or collection" of any

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[7]The Alabama Code provides: Where any taxpayer in the payment of taxes or licenses which are paid directly to the Department of Revenue, by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment ... the treasurer is authorized to pay such warrant for the amount of such overpayments or erroneous payment.
ALA. CODE § 40-1-34 (1975).

[8]Tax Injunction Act, 28 U.S.C. § 1341.

state tax when that state offers a plain, efficient, and speedy remedy. The Tax Injunction Act does not bar federal court jurisdiction in this case, however, because this suit was filed to collect a state tax, rather than enjoin, suspend, or restrain the collection of taxes.[9] Furthermore, LL&E chose to bring this suit in the Eastern District Court of Louisiana; and it can not now limit Pilot's defenses.

Even if Pilot had alternative adequate means to challenge the constitutionality of the Alabama tax, this case should be viewed primarily as a dispute between the state of Alabama and Pilot. Pursuant to section 40-17-31(e) of the Alabama Code, the retailer or distributor is required to add the amount of the excise tax to the price of the fuel.[10] Although the code places responsibility for the collection of taxes on the delivering party, it specifically provides that the tax "is in fact a levy on the consumer or user with distributor ... acting merely as an agent of the state for the collection and payment of the tax to the state."[11] Because LL&E acts as a mere agent for the state in the collection of taxes, this suit, in effect, is between the state of Alabama and Pilot Petroleum.

Down to Basics:
Constitutionality of the Tax

The LL&E-Pilot contract clearly places responsibility for payment of the tax on Pilot. Section 5 of the General Provisions of the contract mandates that the receiving party [Pilot] reimburse the delivering party

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[9] *See Hargrave v. McKinney*, 413 F.2d 320 (5th Cir.1969).

[10] ALA. CODE § 40-17-31(e) (1975).

[11] *Id.*

[LL&E] for all taxes "legally required to be paid", which are paid by the delivering party on behalf of the receiving party. Although it was probably never in the contemplation of these parties that they were facing or were even close to a constitutional problem which goes back to the very formation of this new nation, the contract provides that Pilot must pay only taxes that are "legally required to be paid". This language necessarily calls into question the constitutionality of the Alabama tax.

A. Evolution of the
Import-Export Clause

The Import-Export Clause of the United States Constititon states that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports."

Pilot relies on *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946), to support its claim that the Alabama excise tax is a tax on exports and therefore violates the Import-Export Clause. In *Richfield*, the Richfield Oil Company entered into a contract with the New Zealand government for the sale of oil f.o.b. Los Angeles. Richfield delivered the oil by pipeline from its refinery in California to its storage tanks at the harbor where the naval tanker, R.F.A. Nucula, received the oil from the shore tanks into its ship tanks. The oil was then transported to Auckland, New Zealand. No portion of the oil was used in the United States. California assessed a retail sales tax against Richfield measured by the gross receipts of the transaction. The Court reasoned that when the oil was pumped into the ship's tanks, the movement of the oil

abroad had commenced since the parties were certain that the oil would not be diverted for domestic use. Thus, the Court concluded that the sales tax constituted an impost upon an export within the meaning of the Import-Export Clause of the United States Constitution.

Richfield has never been overruled by the United States Supreme Court. However, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), the Court initiated a new approach to the Import-Export Clause. In *Michelin*,the Georgia tax commissioner assessed ad valorem property taxes against tires and tubes imported by Michelin from France and Nova Scotia. Instead of attempting to determine whether the tires and tubes were in fact imports under the Import-Export Clause, the *Michelin* court focused on the nature of the Georgia tax. Specifically, the Court outlined three policies that were to be served by the Clause.

First, the Federal Government must speak with one voice when regulating commercial relations with foreign governments. For example, tariffs which might affect foreign relations could not be implemented by the States consistently with that exclusive power. Second, import revenues were to be the major source of revenue for the Federal Government and should not be diverted to the States. Finally, harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically. *Michelin*, 423 U.S. at 285-86, 96 S.Ct. at 540-41, 46 L.Ed.2d at 503.

The Court decided that the ad valorem property tax did not offend any of these policies. First, the tax had no impact upon the federal government's exclusive regulation of foreign commerce because, "by definition, such a tax does not fall on imports as such because of their place of origin." It could not be used to create special protective tariffs or preferences for certain domestic goods; nor could it be applied selectively to encourage or discourage importation in a manner inconsistent with federal regulation. Second, the tax did not deprive the federal government of any revenues to which it was entitled. Property taxes are taxes by which a state apportions the cost of police and fire protection, which was supplied by the local government. Importers should bear these costs, as well. Although the tax may have a minimal effect on the cost of imports to consumers, the court recognized that the resulting variance in demand for imports would not be large enough to significantly diminish the number of imports upon which the federal government could levy duties so as not to indirectly deprive it of income. Finally, harmony among the states was not disturbed by such a property tax because inland states would be paying only for protective services rendered by coastal states.

Because prohibition of a nondiscriminatory ad valorem property tax did not further any of these objectives of the Import-Export Clause, the Court held that the Georgia tax was not an "impost" or "duty" within the meaning of the Import-Export Clause. However, the Court limited its holding to taxes levied on goods no longer in transit. *Michelin*, 423 U.S. at 302, 96 S.Ct. at 548, 46 L.Ed.2d at 512. It concluded that nothing in the history of the Clause "even remotely

suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of tax that was regarded as objectionable by the Framers." *Michelin*, 423 U.S. at 286, 96 S.Ct. at 541, 46 L.Ed.2d at 503. Therefore, the *Michelin* court left open the question of whether a tax on goods in transit would constitute an "impost" or "duty" under the Import-Export Clause.

In *Washington Revenue Dep't v. Stevedoring Ass'n*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed. 2d 682 (1978), the state of Washington applied a tax to income received from stevedoring[12] activities. Using the *Michelin* three-prong policy test, the Court found that none of the policies were threatened by Washington's business tax. 1) The Federal Governement's ability to conduct foreign policy was not affected. Because all businesses were taxed, special protective tariffs would not be created. Additionally, a foreign business or vessel was not being taxed. 2) Federal import revenues were not affected for the same reasons as in *Michelin*. In fact, the tax's effect on the demand for imported goods was even less substantial than as in *Michelin* because Washington taxed only the value of the loading and unloading of the goods, not the value of the goods themselves. 3) Since the tax only compensated the government for providing protective services, it would not upset harmony among the states.

Although the Court found that the Washington tax did not disturb any of the three policies of the Clause, it still had to address the fact that the stevedoring

[12]Stevedoring is the business of loading and unloading cargo from ships.

activities were taxed while the exported and imported goods were in transit. Thus, the U.S. Supreme Court was faced with the question of whether a business and occupation tax on activities related to in-transit imports and exports violates the Import-Export Clause. Because of the indirect nature of the tax, i.e., the tax did not relate to the value of the goods, the Court refused to discard the *Michelin* approach merely because the goods were in transit. The Court expressly refused to reach the issue now before us today: whether a state may directly tax imports or exports that are in transit. *Washington Stevedoring*, 435 U.S. at 757 n. 23, 98 S.Ct. at 1403 n. 23, 55 L.Ed.2d at 702 n. 23.

B. In-Transit Exports Are Still Within the Clause

It is true that the Import-Export Clause no longer forbids states from taxing all imports and exports without the consent of Congress. The broad prohibition against any and all taxation upon imports and exports has been discarded. However, we believe, consistent with the contemporary view of the Supreme Court, that the Import-Export Clause was specifically intended to prevent the type of taxation involved in this case.

One of the primary reasons for calling the Constitutional Convention of 1787 was to prevent states for inhibiting commerce among themselves and with foreign countries. Before the Convention, coastal states taxed imported goods that were destined for inland states. Inlands states, or states having no convenient ports, were subject to unfair taxation by their neighboring states. As one of the serious con-

troversies before them, the Framers sought to alleviate the problem with the enactment of the Commerce and Import-Export Clause. *See Michelin*, 423 U.S. at 283-84, 96 S.Ct. at 539-40, 46 L.Ed.2d at 502 (quoting 3 M. Farrand, The Records of the Federal Convention of 1787 542 (1911)). Thus, the policies animating both Clauses are the same.

Where the protections of the Commerce Clause have been invoked, the Supreme Court has stated that "laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation." *Bowman v. Chicago & N.R. Co.*, 125 U.S. 465, 482, 8 S.Ct. 689, 697, 31 L.Ed. 700, 706 (1888). Stated another way, the United States Government must speak with one voice when regulating commercial relations with foreign governments. *Michelin*, 423 U.S. at 285, 96 S.Ct. at 540, 46 L.Ed.2d at 503. To permit any and every state to impose a direct tax on goods in the export stream would circumvent this objective.

In this case, the jet fuel was delivered aboard a foreign vessel which was bound for Nova Scotia, Canada. No question existed about its destination. Alabama's excise tax on fuel adversely affects United States' foreign commerce with respect to this very important commodity. The foreign shipment of oil is accomplished primarily through the use of oil tankers. This type of tax discourages foreign parties, who purchase oil from U.S. companies and refineries, from using U.S. ports to transport fuel from the United States into foreign countries. Additionally, coastal states which possess ports like the Port of

Mobile, Alabama derive significant amounts of revenue from this tax, since they are able to tax the large quantities of fuel that is pumped from their port into the tankers.

The Alabama excise fuel tax is not an indirect tax like the taxes levied in *Michelin* and *Washington Stevedoring:* it is not an assessment imposed on stored inventory which includes imported or exported products, nor is it a tax on a business or occupation which is related to the importation or exportation process. Rather, the Alabama fuel tax in this case is a tax that is levied on the goods themselves while they are in transit. As in *Richfield*, the fuel was delivered f.o.b. into the tanks of a foreign flagged tanker for export to a foreign country. Without contradiction, the oil was in transit. It was the subject of foreign export at the time of taxation.

We conclude that the Alabama fuel tax is an impost upon an export within the meaning of the Import-Export Clause, and is therefore unconstitutional. The decision of the district court in in error.

REVERSED.

E. GRADY JOLLY, Circuit Judge, dissenting:

With respect for the majority's view, I dissent, because, first, the contract in this case does not call into question the constitutionality of Alabama's jet fuel tax. Second, even if we must consider the constitutionality of this tax, a non-discriminatory property tax that applies equally to sales, consumption and storage of all jet fuel is plainly not prohibited by the constitu-

tion's Import-Export Clause simply because some of the taxed fuel is exported.

The majority opinion summarily concludes that the language of the contract at issue "necessarily calls into question the constitutionality of the Alabama tax." The majority reads the provision "legally required to be paid" to mean duly or properly imposed in accordance with law. It reaches this interpretation although admitting that "it was probably never in the contemplation of these parties that they were facing or were even close to a constitutional problem." Slip op., 3844, —. The phrase "legally required to be paid" should be read as simply an awkward expression for "payable by law." This reading would effect the parties' stated intent to shift "product taxes, fees or charges imposed [by government entities] on the Delivering Party [LL&E]' to the receiving party, Pilot, without also passing on extra-legal charges arbitrarily imposed by port authorities. Because the jet fuel tax was required by a duly enacted law of the state of Alabama, the contract clearly placed the cost on Pilot. In short, the majority gives the contract an artificial reading to reach the constitutional question, which is contrary to the general proposition that we should avoid constitutional issues when there are non-constitutional grounds upon which the case can be decided. *Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990) (cases cited therein).

Even if the contract requires that we consider the constitutionality of the tax, the majority erred in concluding that "the Import-Export Clause was specifically intended to prevent the type of taxation

involved in this case." Slip op., 3846, —. In reaching its conclusion, the majority reviews the past and recent history of the Clause and observes that the Supreme Court has not explicitly addressed the Clause's application to direct taxes on goods "in transit." The Court's recent decisions, however, make clear that even a tax operating directly on goods "in transit" is not prohibited if it is non-discriminatory and does not frustrate the policies underlying the Clause. Alabama's tax is unquestionably non-discriminatory; it applies equally to all fuel sold or handled for use by anyone, domestically or for export. "Failure to assess the tax would shift the tax burden from [the exporter] and the ultimate consumers of its ...products to the local taxpayers of [Alabama]—a result completely at odds with *Michelin.*" *R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 107 S.Ct. 499, 514, 93 L.Ed.2d 449 (1986) (nondiscriminatory ad valorem tax that applied to imported tobacco not prohibited by Clause because it "is nothing more than a means 'by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth.'") *Id., citing Michelin*, 423 U.S. 276, 287, 96 S.Ct. 535, 541, 46 L.Ed.2d 495 (1976).

Contrary to the majority's conclusion, Alabama's tax does not frustrate the three policies underlying the Import-Export Clause: federal revenue collection, unitary federal foreign economic policy and interstate commercial harmony. There can be no interference with federal revenue collection because the federal government may not tax exports. U.S. Const., Art. I, § 9. Although all property or excise taxes that fall on

imports and exports in some sense affect foreign economic policy,

> it is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on [exports] as such because of their place of [destination]. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any [exportation] in a manner inconsistent with federal regulation.

Michelin Tire Corp. v. Wages, 423 U.S. 276, 286, 96 S.Ct. 535, 541, 46 L.Ed.2d 495 (1976).

Finally, although "allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by 'inland consumers' ... such taxation is the *quid pro quo* for benefits actually conferred by the taxing state." *Michelin*, 423 U.S. at 288-89, 96 S.Ct. at 542. The majority is surely correct that most oil exports are by tanker and that only coastal states can tax this form of commerce; by the same token it is only coastal states that bear the regulatory, administrative and, increasingly, environmental, costs of this commerce. The Framers did not intend such states to bear all these costs, and this nondiscriminatory tax imposed at the Mobile, Alabama port on fuel, which happened to be exported, is not unconstitutional. I therefore respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,
CIVIL ACTION

No. 88-945

SECTION "B"

This cause came on for hearing on a previous day on the motion of plaintiff, the Louisiana Land & Exploration Company (LL&E), for summary judgment, and the motion of defendant, Pilot Petroleum Corporation (Pilot), for summary judgment.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, granted the motion of plaintiff, LL&E, for summary judgment and denied the motion of defendant, Pilot, for summary judgment. Upon request of counsel for the defendant, the Court now provides these written reasons.

R E A S O N S

LL&E is a Maryland corporation with its principal place of business in Orleans Parish, Louisiana. It is engaged in the exploration, production, refining, and marketing of hydrocarbons. Pilot is a Delaware corporation, headquartered in California, and qualified to do business in Louisiana, which purchases aviation fuel.

Pilot contacted Karbon Corporation (Karbon), a petroleum products broker, for purposes of purchasing a quantity of jet fuel oil to be exported to ports on the east coast of Canada. Karbon arranged the purchase from LL&E for delivery Free On Board the Liberian M/T MARY ANN at Mobile, Alabama. LL&E had a gasoline license from the Alabama Department of Revenue which permitted it to sell and export gasoline products from Alabama.

Pilot, which had never made any purchases of products in Alabama, contacted the Alabama State Department of Revenue to inquire whether it had to meet any requirements. Pilot was told that it should obtain a gasoline license from that department. Thereafter Pilot submitted the application and supporting documents to the Alabama Department of Revenue.

On November 7, 1986 LL&E delivered on board the Liberian flag M/T MARY ANN in the port of Mobile, Alabama a quantity of jet fuel for delivery to the east coast of Canada. Thereafter the MARY ANN proceeded to Halifax, Nova Scotia where said cargo was discharged and delivered.

Subsequent to the departure of the MARY ANN for Canada, LL&E submitted to Pilot two invoices. The first invoice was in the amount of $1,722,000 for jet fuel and $50,400 for Alabama state tax, totalling $1,772,400. The second invoice was in the amount of $196,539 for jet fuel and $5,390.78 for Alabama state tax, for a total of $201,929.78.

Pilot notified LL&E that Alabama state tax was not chargeable against this consignment because it was exported to a foreign country, and subtracted the

state tax from the two invoices. Pilot paid the invoices in full, excluding the Alabama state tax.

After consultation with Marvin Schram, Revenue Examiner of the Alabama Department of Revenue, LL&E reported and paid the fuel taxes attributable to these sales in connection with its November 1986 Aviation Fuels Excise Tax return. Mr. Schram advised LL&E that Pilot had failed to obtain a bond until December 3, 1986, and that Pilot's license was not actually issued until December 15, 1986. Mr. Schram told LL&E that a license could operate retroactively to the date of the bond, but not earlier.

LL&E filed a petition for refund with the Alabama Department of Revenue on August 24, 1987. On August 31, 1987 the Alabama Department of Revenue notified LL&E that the petition was denied in full, because Pilot had not been properly licensed in Alabama as a distributor of gasoline at the time of the sales. This notice of denial of request for refund contained incorrect information. It stated that Pilot "arranged for this fuel to be shipped to **another state**."

On September 4, 1987 LL&E contacted Pilot to advise that the petition for refund had been denied. By letter dated September 10, 1987, Fred Smith, on behalf of LL&E, transmitted to Pilot a copy of the notice of denial of request for refund. Stapled to the notice of denial enclosed in Mr. Smith's letter was a statement of appeal rights setting forth the procedures for review of the denial. It stated that "[p]etitions for refund may be reviewed by requesting a conference with the examiner's supervisor or field examiner's supervisor. If agreement is not reached, an informal

hearing may be requested in Montgomery with the Division's Hearings Officer. If agreement is still not reached, a request for a hearing before the Administrative Law Judge may be requested within 15 days of the Department's written denial."

Neither LL&E nor Pilot appealed the denial of the request for a refund.

On January 19, 1988 LL&E repeated its demand upon Pilot for reimbursement of the taxes which LL&E had paid to the Alabama Department of Revenue. Pilot did not reimburse LL&E for the taxes. LL&E then filed this suit.

The contract documents signed by Pilot and LL&E set forth the mutual obligations of Pilot and LL&E with respect to gas sales. Section 5 of the General Provisions deals with taxes:

> 5. TAXES: ... Should any product taxes, fees or charges be imposed on the Delivering Party by any federal, state, or municipal agency as a direct result of this sale or the manufacture, storage, delivery, receipt, or inspection thereof, the Receiving Party will reimburse the Delivering Party for all such taxes, duties, or fees legally required to be paid and paid in respect of the product delivered by it. Should the Receiving Part fail to reimburse Delivering Party, Delivering Party will be entitled to collect reimbursement, damages incurred as a result of non-payment, and reasonable attorney's fees incurred in collection thereof from the Receiving Party.

Under Alabama law, LL&E as the delivering party is liable to the Alabama Department of Revenue for the

collection of excise taxes from Pilot. Ala. Code §40-17-31 (1979). LL&E was "acting merely as an agent of the state for the collection and payment of the tax to the state." §40-17-31(e). The statute reads that it is "the purpose and intent of this provision that the tax levied is in fact a levy on **the consumer or user....**" **Id.** (Emphasis added).

The parties are in agreement that the bond and license were not issued by the State of Alabama until after the sale was made. If the bond and license had been issued timely, that is before the sale, there is no dispute that no tax would have been due to the State of Alabama. However, Pilot is now arguing that Alabama had no right to levy the sales tax on its cargo at all because the cargo was on a foreign vessel destined for a foreign port.

Pilot refers this Court to 46 U.S.C. §883 which prohibits the **interstate** carriage of goods on **foreign** flag vessels on penalty of forfeiture of all of the cargo carried on the vessel. Even had LL&E not been advised in advance that this cargo was for export to a foreign country, Pilot argues that the fact that it was loaded aboard a foreign flag vessel was notice to the world that the product had to go to a foreign country and not to another state.

With respect to goods or products imported to or exported from states of the United States, the U.S. Constitution, §10, Clause 2, provides:

> No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all

Duties and Imposts, laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

This Court has before it the question of who owes the tax to the State of Alabama, LL&E or Pilot. According to both the contract executed by the parties and the Alabama statutes, the purchaser bears ultimate responsibility for the payment of any sales tax. The seller is only to act as the agent of the state in the collection of the taxes.

As between LL&E and Pilot, Pilot owes the taxes to the State of Alabama. Pilot should take up any constitutional arguments with the State of Alabama through the proper procedural channels. After these administrative remedies are exhausted is the proper time to file suit against the State of Alabama challenging the constitutionality of the Alabama tax.

Accordingly,

IT IS THE ORDER OF THE COURT that there be judgment in favor of the plaintiff, the Louisiana Land and Exploration Company, and against the defendant, Pilot Petroleum Corporation, in the amount of $55,790.78, together with interest thereon at the rate of nine and three/quarters (9.75%) percent per annum from September 10, 1987 until paid, and reasonable attorneys' fees incurred in collection of the foregoing.

New Orleans, Louisiana, this 29th day of August, 1988.

/s/Fredrick J.R. Heebe
FREDRICK J.R. HEEBE
UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

SECTION "B"

J U D G M E N T

This cause came on for hearing on a previous day on the motion of plaintiff, the Louisiana Land & Exploration Company, for summary judgment and the Court having granted same; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, the Lousiana Land and Exploration Company, and against the defendant, Pilot Petroleum Corporation, in the amount of $55,790.78, together with interest thereon at the rate of nine and three/quarters (9.75%) percent per annum from September 10, 1987 until paid, and reasonable attorney's fees incurred in collection of the foregoing.

Dated at New Orleans, Louisiana on this 31st day of August 1988.

/s/Fredrick J.R. Heebe
FREDRICK J.R. HEEBE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

EXCEPTIVE ALLEGATION AND ANSWER

The Exceptive Allegation and Answer of Pilot Petroleum Corporation to the Complaint of Louisiana Land and Exploration Company, with respect represents:

EXCEPTIVE ALLEGATION

The Court is without personal jurisdiction over Defendant or subject matter jurisdiction over the claims asserted, and the Complaint should be dismissed for lack of jurisdiction and service upon Pilot Petroleum Corporation should be quashed as invalid.

FIRST DEFENSE

All allegations and claims asserted by Plaintiff in this action arise out of transactions in the State of Alabama and are subject to law of the State of Alabama. Accordingly, this is an improper or inconvenient forum and this action should be dismissed, or alternatively transferred to the U.S. District Court in Alabama.

SECOND DEFENSE

Reserving the foregoing jurisdictional exceptions and defenses, Defendant answers the allegations of fact of the articles of the Complaint as follows:

1.

Admits Article 1.

2.

Admits Defendant is a Delaware corporation having its principal place of business in California and denies the remaining allegations of Article 2.

3.

Denies Article 3.

4.

Denies Article 4 except it admits that the exhibit is authentic and the best evidence of its contents.

5.

Denies Article 5 except it admits that the exhibit is authentic and contains the best evidence of its contents.

6.

Denies Article 6 except it admits that the exhibits referred to are authentic and are the best evidence of their contents.

7.

Denies Article 7 and the validity of Exhibit E.

8.

Denies Article 8.

9.

Denies Article 9 and applicability of Exhibit E to the transaction which is the subject of this suit.

10.

Admits that said jet fuel was delivered FOB the M/V MARYANNE, a Liberian flag vessel, and denies that said transaction gave rise to any liability for payment of taxes to the State of Alabama by Defendant or Plaintiff.

11.

Denies Article 11.

12.

Admits the authenticity of Exhibit F and that it was sent to Defendant, but denies the validity of Exhibit F or the accuracy of its contents.

13.

Admits that Defendant received Exhibit G, but denies the validity of Exhibit G or the accuracy of its contents.

14.

Denies Article 14 and further avers that if Plaintiff paid said taxes as alleged, Plaintiff voluntarily paid them for Plaintiff's own account, and Plaintiff is in no way entitled to claim reimbursement of said taxes from Defendant.

15.

Defendant avers that it is a properly licensed and bonded distributor of gasoline with the Alabama Department of Revenue and denies the remainder of Article 15.

16.

Denies Article 16.

17.

Denies Article 17 for lack of sufficient information to justify a belief.

18.

Admits that demand was made, but denies the validity or enforceability of any claims or demands made therein.

19.

Defendant avers that it does not owe the taxes claimed and therefore had no reason to pay or reimburse same to Plaintiff.

20.

Denies Article 20.

WHEREFORE, Petitioner prays that service on it be quashed and dismissed for lack of personal and subject matter jurisdiction; alternatively that the Complaint be transferred to the U.S. District Court in Alabama. If this Honorable Court retains jurisdiction,

Defendant prays that after due proceedings had, there be judgment against Plaintiff and in favor of Defendant, dismissing the Complaint at Plaintiff's costs, and for all general and equitable relief.

/s/Robert B. Deane
ROBERT B. DEANE
CHAFFE, MCCALL,
PHILLIPS, TOLER
& SARPY

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served upon counsel of record by hand and/or U.S. Mail, postage prepaid and properly addressed, this 2nd day of May, 1988.

/s/Robert B. Deane
ROBERT B. DEANE
CHAFFE, MCCALL,
PHILLIPS, TOLER
& SARPY

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

MOTION OF PLAINTIFF,
THE LOUISIANA LAND AND EXPLORATION
COMPANY,

FOR SUMMARY JUDGMENT

Plaintiff, The Louisiana Land and Exploration Company, through undersigned counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully moves for summary judgment in its favor and against defendant, Pilot Petroleum Corporation. As set forth in the accompanying memorandum, the affidavits of Bob Cooper and Fred Smith, and attached exhibits, there is no genuine dispute as to any material fact.

/s/John F. Landrum
JOHN F. LANDRUM
TRIAL COUNSEL

CERTIFICATE

I hereby certify that a copy of the foregoing Motion for Summary Judgment Memorandum in Support, Notice of Motion, and Statement of Uncontested

Material Facts, have been served upon all counsel of record by hand delivery or by depositing same in the United States mail, postage prepaid and properly addressed, this 17th day of July, 1988.

/s/John F. Landrum
JOHN F. LANDRUM
TRIAL COUNSEL

STATEMENT OF UNCONTESTED MATERIAL FACTS SUBMITTED BY PLAINTIFF, THE LOUISIANA LAND AND EXPLORATION COMPANY

Plaintiff, The Louisiana Land and Exploration Company ("LL&E"), pursuant to Rule 3.9 of the Local Rules for the United States District Court, Eastern District of Louisiana, submits the following Statement of Uncontested Material Facts.

1.

On November 4, 1986, Karbon Corporation, as broker, transmitted to LL&E, in New Orleans, Louisiana, a telex confirming the sale by LL&E to Pilot of approximately One Hundred Thousand (100,000) barrels of jet fuel oil at the price of .4100 cents per gallon, FOB Mobile, Alabama.

2.

On November 7, 1986, Karbon Corporation as broker transmitted to LL&E in New Orleans, Louisiana, a second telex confirming the sale by LL&E to Pilot of approximately Twelve Thousand (12,000) barrels of jet fuel oil at the price of .4375 cents per gallon, FOB Mobile, Alabama.

3.

LL&E also sent to Pilot telex copies of formal agreements pertaining to the sale of jet fuel called for by the telexes above described. Both formal agreements incorporate by reference the terms of LL&E's standard General Provisions. Through the course of prior dealings between LL&E and Pilot, Pilot also had possession of and familiarity with the terms of LL&E's standard General Provisions before entering the sales agreements, and before accepting the jet fuel from LL&E.

4.

The General Provisions provide in pertinent part as follows:

> 5. TAXES: ... Should any product taxes, fees or charges be imposed on the Delivering Party by any federal, state, or municipal agency as a direct result of this sale or the manufacture, storage, delivery, receipt, or inspection thereof, the Receiving Party will reimburse the Delivering Party for all such taxes, duties, or fees legally required to be paid and paid in respect of the product delivered by it. Should the Receiving Party fail to reimburse Delivering Party, Delivering Party will be entitled to collect reimbursement, damages incurred as a result of non-payment, and reasonable attorney's fees incurred in collection thereof from the Receiving Party.

5.

As called for in the telexes, and in the corresponding formal agreements, on or about November 9, 1986,

LL&E delivered the jet fuel oil at the Port of Mobile, FOB the MARYANNE, a tanker flying the Liberian flag. Pilot accepted the jet fuel so delivered, without objection.

6.

LL&E has performed all of its obligations under the jet fuel sales agreements.

7.

On November 13, 1986, LL&E issued to Pilot an invoice in the amount of $201,929.78, representing $196,539.00 due for jet fuel called for in the November 4, 1986 telex, together with Alabama jet fuel tax in the amount of $5,390.78.

8.

On November 21, 1986, LL&E issued to Pilot an invoice in the amount of $1,772,400.00, representing $1,722,000.00 due for jet fuel called for in the November 7, 1986 telex, together with Alabama jet fuel tax in the amount of $50,400.00.

9.

Pilot paid the purchase price of the jet fuel, but did not pay LL&E the Alabama jet fuel taxes. Pilot represented to LL&E that Pilot was properly licensed and bonded as a distributor of gasoline with the Alabama Department of Revenue at the time Pilot purchased the jet fuel in question. Pilot represented that it was accordingly exempt from payment of the fuel taxes under the Alabama state law exemption for sales in interestate commerce to licensed distributors.

10.

In compliance with Alabama law, LL&E had reported and paid the fuel taxes in connection with its November 1986 Aviation Fuels Excise Tax return.

11.

LL&E filed a petition for refund with the Alabama Department of Revenue on August 24, 1987.

12.

On August 31, 1987, the Alabama Department of Revenue notified LL&E that the petition for refund was denied in full.

13.

Fred Smith, on behalf of LL&E, called Ed Wilson, controller for Pilot, on September 4, 1987, to advise that the Petition for Refund had been denied.

14.

By letter dated September 10, 1987, Mr. Smith transmitted a copy of the Notice of Denial of Request for Refund to Pilot. Stapled to the Notice of Denial enclosed in Mr. Smith's letter was a statement of Appeal Rights clearly setting forth the procedures for review of the denial.

15.

On January 19, 1988, LL&E repeated its demand upon Pilot for reimbursement of the taxes which LL&E had paid to the Alabama Department of Revenue.

16.

Despite the lapse of several months, Pilot has never reimbursed LL&E for the subject taxes.

/s/John F. Landrum
JOHN F. LANDRUM
TRIAL COUNSEL

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff, The Lousiana Land and Exploration Company ("LL&E") has sued defendant, Pilot Petroleum Corporation ("Pilot") for reimbursement of jet fuel excise tax which plaintiff paid to the Alabama Department of Revenue. LL&E also seeks interest and attorneys' fees.

STATEMENT OF FACTS

LL&E is a Maryland corporation with its principal place of business in Orleans Parish, Louisiana, and engaged in the exploration, production, refining and marketing of hydrocarbons. Pilot is a Delaware corporation, headquartered in California, and qualified to do business in Louisiana, which purchases aviation fuel.

As set forth in the Affidavits of Bob Cooper and the exhibits identified in the affidavit, LL&E entered into two agreements to sell jet fuel to Pilot and delivered the jet fuel on or about November 9, 1987 in Mobile, Alabama. At issue is Pilot's failure to pay to LL&E the Alabama jet fuel excise taxes of $55,790.78 attributable to the two sales.

As set forth in the Affidavit of Fred Smith and the exhibits identified therein, in compliance with Alabama law, LL&E had reported and paid the fuel taxes attributable to these sales in connection with its November 1986 Aviation Fuels Excise Tax return. When LL&E invoiced Pilot for the fuel sales, Pilot represented and warranted to LL&E that Pilot was properly licensed and bonded as a distributor of gasoline with the Alabama Department of Revenue at the time Pilot purchased the jet fuel, and accordingly exempt from payment of the fuel taxes under the Alabama state law exemption for sales in interestate commerce to licensed distributors.

LL&E accordingly filed a petition for refund with the Alabama Department of Revenue on August 24, 1987. On August 31, 1987, the Alabama Department of Revenue notified LL&E that the petition for refund was denied in full. Contrary to Pilot's representations, Pilot had not been properly licensed in Alabama as a distributor of gasoline at the time of the sales, and the fuel sales were subject to the taxes.

Fred Smith, on behalf of LL&E, called Ed Wilson, controller for Pilot, on September 4, 1987, to advise that the Petition for Refund had been denied. By letter dated September 10, 1987, Mr. Smith transmitted to Pilot a copy of the Notice of Denial of Request for Refund. Stapled to the Notice of Denial enclosed in Mr. Smith's letter was a statement of Appeal Rights clearly setting forth the procedures for review of the denial.

On January 19, 1988, LL&E repeated its demand upon Pilot for reimbursement of the taxes which LL&E had paid to the Alabama Department of Revenue. Despite the lapse of several months, Pilot has never reimbursed LL&E. LL&E accordingly filed this suit.

RESPONSIVE PLEADINGS OF PILOT

Pilot entered an appearance and filed an "Exceptive Allegation and Answer." The "Exceptive Allegation" contested jurisdiction and service. Pilot also asserted in its First Defense that the Eastern District of Louisiana is an inconvient forum and, without filing a motion of any kind, requested a transfer to the United States District Court in Alabama. See "Exceptive Allegation and Answer," p. 1.

On the merits, Pilot denied the "validity" of Exhibit E. Pilot asserted that LL&E "voluntarily" paid the taxes. Pilot also asserted that Pilot is a properly licensed and bonded distributor of gasoline with the Alabama Department of Revenue. (Pilot did not assert that it was properly licensed and bonded at the time of the fuel sales.)

ARGUMENT

A. This Court has Personal Jursidiction Over Pilot.

According to the records of the Louisiana Secretary of State, Pilot is qualified to do business in Louisiana. It maintains an office at the Maritime Building, Suite 700, New Orleans, Louisiana 70130. Its registered agent for service of process is the Prentice-Hall

Corporation System, 1006 Hibernia Bank Building, New Orleans, Louisiana 70112. A copy of the certificate from the Louisiana Secretary of State is attached hereto as Exhibit K. Accordingly, Pilot is subject to the jurisdiction of this Court. L.S.A.-R.S. 12:306 states:

Effect of certificate of authority

> A foreign corporation which before January 1, 1969 has received a certificate of authority which is still valid, or which shall on or after January 1, 1969 receive a certificate of authority, shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this Chapter:
>
> (1) Be authorized to transact business in this state, subject to such limitations as may be recited in the certificate of authority;
>
> (2) Enjoy the same, but no greater, rights and privileges as a business or nonprofit corporation organized under the laws of this state to transact the business which such foreign corporation is authorized to transact in this state; and
>
> (3) Except as in this Chapter otherwise provided, be subject to the same duties, restrictions, penalties and liabilities imposed on or after January 1, 1969 upon a business or nonprofit corporation of like character organized under the laws of this state.

This statute gives Pilot the same rights, privileges and liabilities as a Louisiana corporation, including amenability to suit in Louisiana.

Pilot became subject to this Court's jurisdiction when service was made upon Pilot's registered agent in New Orleans according to the requirements of law. **Compare** Exhibit K and Return of Process Server, attached as Exhibit L. Pilot's Exceptive Allegation is not well grounded in fact and must have been filed to cause unnecessary delay and needless increase in the cost of this litigation.

B. **Pilot Owes LL&E the Amount Sought in the Complaint.**

After the exchange of telexes confirming the sales contracts (Exhibits A and B), LL&E sent to Pilot formal sales agreements (Exhibits C and D). These formal agreements incorporate by reference LL&E's standard General Provisions (Exhibit E). The contract documents attached as Exhibit A through E, and authenticated by the Affidavit of Bob Cooper, unambiguously set forth the mutal obligations of LL&E and Pilot with respect to the subject gas sales. Section 5 of the General Provisions clearly makes Pilot responsible to LL&E for the excise taxes sued upon:

> 5. TAXES: ... Should any product taxes, fees or charges be imposed on the Delivering Party by any federal, state, or municipal agency as a direct result of this sale or the manufacture, storage, delivery, receipt, or inspection thereof, the Receiving Party will reimburse the Delivering Party for all such taxes, duties, or fees legally required to be paid and paid in respect of the product delivered by it. Should the Receiving Party fail to reimburse Delivering Party, Delivering Party will be entitled to collect reimbursement, damages incurred as a result of non-payment, and reasonable attorney's

fees incurred in collection thereof from the Receiving Party.

Even if Section 5 of the General Provisions did not clearly control, LL&E would be entitled to recover from Pilot. Under Alabama law, LL&E as the delivering party is liable to the Alabama Department of Revenue for the **collection** of excise taxes from Pilot. Ala. Code §40-17-31 (1979). A copy of the Alabama statute is attached. This statute refutes Pilot's claim that LL&E paid the fuel tax "voluntarily". More importantly, the Alabama statute defines LL&E's obligation as one to "collect." The tax is **levied** by law on Pilot. **See** §40-17-31(e). The language of the statute clearly established LL&E's right to reimbursement from Pilot, independently of the General Provisions.

Finally, Pilot's assertion that it is properly licensed and bonded in Alabama and exempt from the taxes is meaningless because the question is whether Pilot was properly licensed and bonded in November, 1986. Pilot has not even asserted in this lawsuit that it was licensed and bonded at that time.

Any contention that Pilot was properly licensed and bonded at the pertinent time frame has been formally rejected by the Alabama Department of Revenue (Exhibit H). Pilot had every opportunity to present its arguments to the Department of Revenue, and to appeal the Department's denial. Pilot failed to avail itself of any such opportunity.

C. **LL&E is Entitled to Interest and Attorney's Fees.**

After the Alabama Department of Revenue notified LL&E that its Petition for Refund had been denied, LL&E demanded reimbursement from Pilot on September 10, 1987. Because Pilot's obligation was to pay LL&E a sum certain, LL&E is entitled to legal interest at the rate of twelve percent (12%) per annum from September 10, 1987, to January 1, 1988, and thereafter at the rate of twelve (12%) until paid. La.C.C. Arts. 2000, 2924B(4).

Additionally, Pilot must pay LL&E's attorneys' fees. Section 5 of the General Provision attached to the sales agreement (Exhibit E), quoted above, provides that if Pilot fails to reimburse LL&E, LL&E will be entitled to recover reasonable attorneys' fees incurred in collection.

Independently of the General Provisions, it is apparent that some of all of Pilot's defenses have been asserted merely to delay collection, in violation of the Federal Rules of Civil Procedure. LL&E accordingly requests a hearing after the resolution of this motion, so that LL&E may present evidence of the attorneys' fees it has incurred.

D. **This Case is Appropriate for Summary Judgment.**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the pleadings, Affidavits of Bob Cooper and Fred Smith, and the Exhibits authenticated thereby and attached hereto, show that there is no genuine issue as to any material fact and that LL&E is

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entitled to judgment as a matter of law. Pilot can now avoid summary judgment only by producing serious evidence in support of its "exceptive allegations" and puported defenses:

> When the moving party has carried its burden under Rule 56(c) its opponent must do more than show that there is some metaphysical doubt as to the material facts.

Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In this respect, LL&E need not produce evidence to negate every aspect of Pilot's case:

> Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, by pointing out to the District Court—that there is an absence of evidence to support the non-moving party's case.

Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). To date, Pilot has produced no evidence whatsoever supporting any contention raised in the Exceptive Allegations and Answer. Further still is Pilot from producing evidence with sufficient legal meaning to prevent summary judgment.

CONCLUSION

For these reasons, LL&E respectfully requests entry of summary judgment as set forth in the foregoing motion.

/s/John F. Landrum
JOHN F. LANDRUM
TRIAL COUNSEL

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

SECTION "B" (1)

MEMORANDUM IN OPPOSITION TO LL&E'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PILOT'S MOTION FOR SUMMARY JUDGMENT

Pilot Petroleum Corp. ("Pilot") respectfully submits that Louisiana Land and Exploration Company ("LL&E") has no cause or right of action against Pilot for amounts erroneously paid by LL&E to the Alabama Department of Revenue purporting to be state tax imposed upon goods exported to a foreign country, which payments were made by LL&E despite advices by Pilot that said taxes were not due. The statements of fact of Plaintiff and Defendant establish the following.

Pilot contacted Karbon Corporation, a petroleum products broker, for purposes of purchasing a quantity of jet fuel oil to be exported to ports on the East coast of Canada. Karbon Corporation arranged the purchase from LL&E for delivery Free On Board the Liberian M/T MARY ANN at Mobile, Alabama. (See

LL&E Exhibits A & B). LL&E had a gasoline license from the Alabama Department of Revenue which permitted it to sell and export gasoline products from Alabama.

Pilot, which had never made any purchases of products originating in Alabama, contacted the Alabama State Department of Revenue to learn whether it had to meet any requirements, and was told that it should obtain a gasoline license from that department. Pilot submitted the necessary applications for this purpose and the license was approved, but apparently it was not issued until after the export took place.

In the interim, Pilot arranged for the Liberian M/T MARY ANN to receive said cargo at Mobile and carry same to Canada. The MARY ANN presented itself at Mobile where the cargo was delivered in accordance with the terms of the purchase agreement, Free on Board the M/V MARY ANN. According to the terms of the contract and as a matter of fact, Pilot did not take possession or ownership of the product until it had passed from the shore hoses into the ship's manifold (pipe connection with several apertures, valves and lines for distribution to the tanks of the MARY ANN). The MARY ANN proceeded to Halifax, Nova Scotia, where said consignment was discharged and delivered (Bill of Lading, Ex. Pilot "1").

It is possible that there were several misunderstandings of fact giving rise to this suit, but they should not militate against Pilot. First, there is a serious question as to whether Pilot needed an Alabama gasoline license to purchase from LL&E

gasoline for export to a foreign country. Second, LL&E had absolutely no obligation to pay this tax to the State of Alabama and did so contrary to advices of Pilot. Third, the Alabama Department of Revenue was apparently under the impression that this consignment was exported to another state within the United States, not to a foreign country, and LL&E did nothing to correct this mistake although it was patently obvious that the cargo was destined for a foreign port. Having voluntarily and unnecessarily paid the tax against Pilot's advices, LL&E submitted a token petition for refund to the Alabama Department of Revenue which apparently did not recall that this cargo was exported to a foreign country, and when the Petition was denied, LL&E failed to follow up on its appeal rights and now seeks to collect amounts equal to the so called taxes from Pilot.

Anyone engaged in the commercial movement of dry or bulk cargo on vessels, including petroleum products, knows of the statutory prohibition against interstate carriage of goods on foreign flag vessels on penalty of forfeiture of all of cargo so carried on the vessel, 46 U.S.C. §883. Even had LL&E not been advised in advance that this cargo was for export to a foreign country, the fact that it was loaded aboard a foreign flag vessel was notice to the world that the product had to go foreign.[1]

---

[1]"No merchandise shall be transported by water or land and water, on penalty of forfeiture thereof, between points in the United States ... either directly or via a foreign port, or for any part of the transportation in any other vessel than a vessel built in an documented under the laws of the United States and owned by ... citizens of the United States ..." 46 U.S.C. §883.

With respect to goods or products exported to or from states of the United States, the U.S. Constitution, Section 10, Clause 2, provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

This section has been interpreted and applied by the U.S. Courts to mean exactly what it states. **Hamilton Mfg. Co. v. Massachusetts**, 73 U.S. 632, 6 Wall, 18 L.Ed. 904 (1868); **Kosydar v. National Cash Register Co.**, 94 S.Ct. 2108, 417 U.S. 62, 40 L.Ed. 2d 660 (1974). It has been specifically applied to petroleum products. **Phipps v. Cleveland Refining Co.**, 43 S.Ct. 418, 261 U.S. 449, 67 L.Ed. 739 (1923).

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156, 160, 91 L.Ed. 80 involved the validity of a state tax measured by the gross receipts derived from the sale [as in the instant case] of oil and oil products in the state of California. Richfield sold oil and oil products "F.O.B. Ship Los Angeles" for export to New Zealand. California claimed this to be an excise tax for the privilege of conducting a retail business in California, and therefore not a tax on the sale, but a tax upon receipts from the sale. The U.S. Supreme Court held that to the extent that the sales tax was imposed upon goods exported foreign or the price thereof, it constituted an

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impost or duty on exports and violated the Import-Export Clause of the Federal Constitution (Article 1, §10, Clause 2).

In **Richfield Oil Corp., supra** the U.S. Supreme Court dealt with numerous arguments by the state that the consignment of oil was actually delivered within territorial waters of California; that the type of tax in question was not an impost or duty within the meaning of §10, Clause 2; that the tax was not on an export but a tax for the privilege of conducting business, and so forth. The Court rejected the arguments as subterfuge, holding that a tax on proceeds from a sale of goods purchased for the specific purpose of export, by any other name, whether sales tax, license tax or occupation tax, was nevertheless an unconstitutional taxation in violation of Article 10, Clause 2, stating:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters

and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was noting equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of a foreign destination is plain.

It seems clear under the decisions which we have reviewed involving Article 1, §9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel...

It is argued, however, that the present tax is not an impost within the meaning of the Import-Export Clause. The tax is measured by the gross receipts of retail sales and is levied on retailers 'For the privilege of selling tangible personal property at retail.' Cal Stat 1935, p. 1253. The retailers are authorized to collect the tax from the consumers. Cal Stat 1933, p. 2602. And a sale is 'any transfer of title or possession...in any manner or by any means whatsoever, of tangible personal property, for a consideration.' Cal Stat 1935, p. 1256. The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; that it is not laid

upon the consumer and does not become a tax on the sale or because of the sale. 27 Cal2d p. 152, 163 P2d p. 2.

That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether that tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect."

In the instant case the telex confirmation of purchase attached to LL&E's Statements of Facts (Exs. "A" and "B"), and the bills of lading attached to Edward R. Wilson's Affidavit as Exs. Pilot "1" and "1a", place this case squarely within the ambit of **Richfield Oil Corp.**; the cargo was delivered F.O.B. into the tanks of a foreign flag tanker which as a matter of law, intent and fact, received said cargo for export to a foreign country. Whether Pilot is an entity from a different U.S. state or from a different nation is of no consequence; the oil was shipped by negotiable bill of lading to the order of a foreign party, "Banque Indosuez." Under **Richfield Oil Corp.** the goods were in transit for exportation "no later than the delivery of the oil into the vessel..." which is the point at which title passed from LL&E. In the instant situation it appears more likely that LL&E stands in the same position as the exporter-appellant in **Richfield Oil Corp.**, but whether LL&E or Pilot, or both stand in the shoes of Richfield, the state tax sought to be imposed on this sale of cargo for foreign export is unconstitutional and cannot be enforced against either LL&E or Pilot.

In **Collins v. Bay City Export Lumber Co.**, 70 S.2d 273, 277; 260 Ala. 308; (Alabama 1953) the Supreme Court of Alabama considered whether a flat $100 license tax on lumber companies which exported lumber to foreign countries, was invalid as a violation of the Import-Export Clause of the U.S. Constitution. The Court relied heavily upon the U.S. Supreme Court decision in **Richfield Oil Corp. v. State Board of Equalization, supra,** compared the Alabama lumber license tax with the sales tax of **Richfield Oil Corp.**, and concluded that the lumber license tax was invalid as a violation of the U.S. Constitution.

It is respectfully submitted that the U.S. Supreme Court decision in **Richfield Oil Corp.** as well as that of the Alabama Supreme Court in **Collins v. Bay City Export Lumber Co., supra**, apply to the instant case to render invalid as unconstitutional any tax sought to be imposed by the State of Alabama on the sale of this consignment of jet fuel oil for export to Canada, and that accordingly LL&E had no legal duty to pay the "tax" to the State of Alabama, nor does it have any right to attempt to collect the voluntarily paid "tax" from Pilot Petroleum Corporation.

Accordingly, Pilot respectfully submits that LL&E's Motion for Summary Judgment should be denied, and Pilot's Motion for Summary Judgment dismissing LL&E's suit with prejudice, should be granted.

/s/Robert B. Deane
ROBERT B. DEANE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

SECTION "B"

MOTION FOR PILOT PETROLEUM CORP. FOR SUMMARY JUDGMENT

Defendant Pilot Petroleum Corporation, through undersigned counsel, respectfully moves this Honorable Court for a Summary Judgment dismissing with prejudice the Complaint of Louisiana Land and Exploration Company for the reasons stated in the attached Statement of Material Facts and Memorandum in support of this Motion.

/s/Robert B. Deane
ROBERT B. DEANE

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served upon counsel of record by hand or by United States mail, postage prepaid and properly addressed, this 26th day of July, 1988.

/s/Robert B. Deane
ROBERT B. DEANE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

SECTION "B"

STATEMENT OF MATERIAL FACTS OF DEFENDANT, PILOT PETROLEUM CORP. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Pilot Petroleum Corporation ("Pilot") submits the following statement of facts in support of its Motion for Summary Judgment dismissing the Complaint of Louisiana Land and Exploration Company ("LL&E") with prejudice.

1.

Pilot incorporates herein as part of its Statement of Material Facts, the Affidavit of Edward R. Wilson, Comptroller of Pilot Petroleum Corporation, Statements 1-11, a copy of which is attached hereto, with Exs. Pilot "1-4", all of which are made a part hereof.

2.

The fact that Pilot did not take title to said jet fuel under the terms of the sale until it was delivered free

on board the foreign flag M/T MARY ANN, and the bills of lading issued for said cargo (Exs. Pilot "1" and "1a") establish that the jet fuel in question had started upon its export journey and that the certainty of the foreign destination was apparent.

3.

When LL&E submitted invoices to Pilot (Exs. Pilot "2" and "3"), purporting to charge Alabama jet fuel tax with respect to the purchase of the export sale of the subject jet fuel, Pilot immediately notified LL&E that the tax was not due on this sale and that Pilot did not intend to pay the tax. Pilot drew a line through the sales tax charges on said invoices to show that they would not be paid, and paid the remainder of the invoices in full.

4.

LL&E negligently or arbitrarily paid the amounts claimed herein to the Alabama Department of Revenue although said amounts were not legally due. Thereafter LL&E petitioned for refund to the Alabama Department of Revenue but failed to provide the necessary information in its Petition to show that this consignment of jet fuel had been purchased for the sole and specific purpose of exportation to Canada.

5.

Pilot never owed any state taxes on the subject jet fuel exported to Canada, and having paid no taxes to the State of Alabama, had no standing, and presently has no standing to participate in LL&E's Petition for Refund, but has always been willing to cooperate in LL&E's efforts to obtain a refund.

6.

Throughout the foregoing transactions LL&E had a valid gasoline license from the Alabama Department of Revenue and authorized to export jet fuel from Alabama.

/s/Robert B. Deane
ROBERT B. DEANE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

No. 88-945

SECTION "B"

STATEMENT OF CONTESTED MATERIAL FACTS SUBMITTED BY DEFENDANT PILOT PETROLEUM CORPORATION

Defendant, Pilot Petroleum Corporation, ("Pilot") submits the following statements of fact which controvert or qualify the Statement of Uncontested Facts submitted by plaintiff, Louisiana Land and Exploration Company ("LL&E").

1. LL&E's statements 1 and 2 are correct as far as they go, but do not show that the sale "FOB Mobile, Alabama" was in fact a sale "Free On Board" the Liberian flag Motor Vessel MARY ANN for carriage of said cargo to ports on the East Coast of Canada.

2. Pilot does not contest LL&E's statements 3 through 8 except it denies that LL&E had any legal basis to include in its invoices of November 13, 1986 and November 21, 1986 any amount for Alabama State jet fuel tax.

3. Pilot contests LL&E's statement 10 in that if any payment was made of Alabama excise tax by LL&E, said tax was not paid in compliance with any valid Alabama law requiring same. Further, LL&E was not compelled by any legal process to pay the alleged fuel taxes, but arbitrarily or negligently made said payments when none were due.

4. LL&E's statements 11 and 12 are correct as far as they go. Pilot submits as controverting evidence the fact that LL&E unduly delayed in filing a petition for refund; LL&E's petition for refund failed to advise the Alabama Department of Revenue that the consignment in question had been loaded by LL&E aboard a foreign flag vessel for delivery to a foreign port; and thereafter LL&E failed to pursue any of its administrative and judicial remedies with respect to the refund sought within time limits specified by the Alabama Department of Revenue. (Exhibit H and attachment, LL&E Statement of Facts).

5. Pilot never owed any taxes on the subject jet fuel exported to Canada, and having paid no taxes to the State of Alabama, had and has no standing to participate in LL&E's petition for refund. Subject to these qualifying statements Pilot does not contest LL&E's statements 13 through 16.

6. Throughout the foregoing transactions LL&E had a valid gasoline license from the

Alabama Department of Revenue and was authorized to export jet fuel from the State of Alabama.

7. Pilot submits additional statements of fact contained in the Affidavit of Edward R. Wilson, comptroller of Pilot Petroleum Corporation, numbers 1 through 11 attached hereto and incorporated herein in extenso, as controverting statements of fact, including Exhibits Pilot 1 through 4 attached thereto.

/s/Robert B. Deane
ROBERT B. DEANE

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served upon counsel of record by hand or by U.S. Mail, postage prepaid and properly addressed, this the 26th day of July, 1988.

/s/Robert B. Deane
ROBERT B. DEANE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

SECTION "B"

No. 88-945

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF PILOT PETROLEUM CORPORATION

Plaintiff, Louisiana Land and Exploration Company ("LL&E") has moved for summary judgment on its claim for reimbursement of jet fuel excise taxes. Defendant, Pilot Petroleum Corporation ("Pilot") has filed a cross-motion for summary judgment. Both motions will be heard on August 10, 1988.

Pilot's defense rests on the contentions that LL&E "voluntarily" paid the tax to the Alabama Department of Revenue; that LL&E failed to identify the jet fuel's foreign destination in petitioning for refund on Pilot's behalf; that the tax is unconstitutional; and that LL&E had some duty to appeal the state's denial of the refund. Every single element of Pilot's position is unsupportable.

As evidenced by the Affidavit of Patricia A. Godfrey and the Petition For Refund of Taxes

attached hereto and attested by the Supplemental Affidavit of Fred Smith attached hereto, LL&E paid the tax only after consultation with Marvin Schram, Revenue Examiner of the Alabama Department of Revenue. Pilot had apparently made some attempt to exempt itself from the jet fuel excise tax by posting a bond and obtaining a distributor license. However, Mr. Schram advised Ms. Godfrey that Pilot failed to obtain a bond until December 3, 1986 and Pilot's license was not actually issued until December 15, 1986. (These facts are not disputed by Pilot.) Mr. Schram stated that a license could operate retroactively to the date of the bond, but not earlier.

Mr. Schram instructed LL&E to report the fuel sales on its November, 1986 return, pay the taxes with the November return, and collect the taxes from Pilot. Section 40-17-31(e) of the Alabama Code provides:

> Every distributor, refiner, retail dealer or storer of gasoline or other fuels taxed by this section shall add the amount of the excise tax levied and assessed herein to the price of the gasoline or other fuels taxed by this section, it being the purpose and intent of this provision that the tax levied is in fact a levy on the consumer or user with distributor, refiner, retail dealer or storer, or in the case of a licensed user, acting merely as an agent for the state for the collection and payment of the tax to the state.

After receiving Mr. Schram's advice, LL&E could not simply ignore the tax as Pilot now suggests. Pilot's

assertion that LL&E "voluntarily" paid the tax is wrong.[1]

Equally unfounded is Pilot's position that LL&E submitted a petition for refund which "apparently did not recall that this cargo was exported to a foreign country..." To the contrary, the final sentenee of the Petition For Refund of Taxes (attached) clearly recites, "Product went to Canada, therefore purchaser claims that it is not taxable." Although the August 31, 1987 Notice of Denial of Request for Refund (attached to LL&E's original memorandum as Exhibit H) contains loose language characterizing the sale as interstate rather than foreign, the denial was not predicated upon the jet fuel's destination. Exhibit H shows that the Department of Revenue denied the refund due to its well-documented finding that Pilot failed to license and bond itself timely.

Pilot's newest defense—one not raised at the time of the transaction and not raised in its "Exceptive Allegation and Answer"—is that the transaction was constitutionally untaxable. Pilot is desperately attempting to raise an issue where none exists and shift responsibility for its own negligent failure to post a bond and obtain a license. Pilot's constitutional argument totally misses the point. Pilot had advance notice and every opportunity to present its position at every administrative level and failed to do so. Pilot knew of the Petition for Refund; its controller provided the information on which the Petition for Refund was based. Pilot was promptly informed of the results of the refund petition and the reasons therefor. Pilot took

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[1]The same "voluntary" payment prevented the accrual of state law penalties which would have been passed on to Pilot.

no action and did not suggest to LL&E any basis for taking further action. It cannot now be heard to complain, because the issue is **res judicata**. Pilot cannot now, in this forum, collaterally attack the final ruling of the Alabama Department of Revenue, and attempt to put LL&E in the position of vouching for the Alabama State law.

Nevertheless, without in any way admitting that the question is a legitimate issue in this proceeeding, LL&E submits that Pilot's constitutional argument is wrong. In support of its constitutional challenge, Pilot has cited the United States Supreme Court decision of **Richfield Oil Corporation v. State Board of Equalization**, 329 U.S. 69, 67 S.Ct. 156 (1946). Pilot has failed, however, to cite the decisions following **Richfield** that initiated a different approach to the Import-Export Clause cases, and authorizes which questioned the validity of the holding in **Richfield**.

In **Michelin Tire Corporation v. Wages**, 423 U.S. 276, 96 S.Ct. 535 (1976), the United States Supreme Court "changed the focus of Import-Export Clause cases from the nature of the goods as imports [or exports] to the nature of the tax at issue." **Limbach v. Hooven & Allison Co.**, 466 U.S. 353, 360, 104 S.Ct. 1837 (1984). In **Michelin**, the taxpayer imported and distributed wholesale in the United States certain automobile and truck tires and tubes manufactured in France and Nova Scotia. When Georgia levied an **ad valorem** property tax on Michelin's inventory of imported tires, stored in its warehouse in Gwinett County, Georgia, Micheline sued in a Georgia state court to contest the statute's constitutionality. The Georgia Supreme Court held that the tires were taxable because, by the time they were assessed, the

tires had lost their status as "imports." The United States Supreme Court affirmed the decision, but for a different reason: it rejected the **Richfield** inquiry whether the tax under review reached "imports or exports," and focused on the nature of the state exaction.

In examining whether the state tax offended the Import-Export Clause, the **Michelin** court voiced three policy considerations:

> The Framers of the Constitution thus sought to alleviate three main concerns ... the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the states consistently with exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-286, 96 S.Ct. at 540. The Court concluded that the Georgia **ad valorem** property tax did not violate the constitutional prohbition against laying any Imposts or Duties on Imports, in part because the tax was nondiscriminatory. That is, it applied not only to inventories of foreign make, but equally to all qualified inventories in the state. 96 S.Ct. at 541-544.

Two years later, the Supreme Court decided **Department of Revenue v. Association of Washington Stevedoring Company**, 435 U.S. 734, 98 S.Ct. 1388 (1978), an export case in which the State of Washington imposed a business and occupation tax to stevedoring. In **Washington Stevedoring**, the Court recognized that prior to the **Michelin** decision, the analysis applied to exports was whether "the goods had entered the 'export stream,' the final, continous journey out of the country." **Washington**, at 751, 98 S.Ct. 1400. Citing **Richfield**, the Court stated, "Previous Supreme Court decisions had assumed that all taxes on imports or exports and on the importing or exporting processes were banned by the Import-Export Clause." **Id.**

The Court then applied the **Michelin** three-part analysis and upheld the Washington tax. One factor was that the protection of federal revenues is not considered when determining the constitutionality of a tax on exports because the Constitution forbids federal taxation of exports. The Court concluded:

> The Washington business and occupation tax, as applied to stevedoring, reaches services provided wholly within the State of Washington to imports, exports, and other goods. The application violates none of the constitutional policies identified in **Michelin**. It is, therefore, not among the "Imposts or Duties" within the prohibition of the Import-Export Clause.

The Court expressly reserved the question of how it would hold under facts like those in **Richfield**:

> We do not reach the question of the applic-

ability of the **Michelin** approach when a State **directly** taxes imports or exports in transit.

Our Brother POWELL, as his concurring opinion indicates, obviously would prefer to reach the issue today, even though the facts of the present case, as he agrees, do not present a case of a tax **on goods in transit**. As in **Michelin**, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument the issue with all its ramifications may be decided.

98 S.Ct. 1403, n. 23.

Learned commentary makes it extremely doubtful that the question left open in **Washington Stevedoring** would be decided today as it was in **Richfield**. Comparing **Richfield** and **Washington Stevedoring**, one commentator has stated:

Similarly, in both cases, the taxes were imposed on the conduct of business by the taxpayers, although the businesses were different, selling oil in **Richfield** and loading and unloading goods from vessels in **Washington Stevedoring**.

By way of distinguishing the two cases, one can argue that the tax in **Richfield**, unlike the tax in **Washington Stevedoring**, fell on the goods themselves, because selling goods involves the essence of the goods, whereas handling or servicing goods is merely an incidental activity. Moreover, the Court in **Washington Stevedoring** appeared to

> regard a tax measured by the value of goods as tantamount to a tax on the goods themselves.
>
> Hence, the Court could distinguish the cases on such grounds, **but such niceties and refinements as to direct and incidental taxes dod not commend themselves as the proper basis for delineating the constitutional taxing powers of the States. A more acceptable basis for deciding the in-transit tax cases under the new Import-Export Clause jurisprudence may be found in the purpose of the clause to prevent the seaboard States from exacting a sale on "goods merely flowing through their ports."**

Hellerstein, **State Taxation** §5.4 (1983) (Emphasis added).

The Alabama jet fuel excise tax is a non-discriminatory tax which applies to all gasoline sales within the State of Alabama unless exempt. In this case, the fuel was refined in Mobile, and not merely flowing through Alabama's ports. The Alabama tax does not interfere with federal foreign policy or cause friction between the states. Thus, Pilot's new contention that the Alabama jet fuel excise tax was an Impost or Duty within the prohibition of the Import-Export Clause, is weak in view of the cited authorities.

At best, Pilot had an **arguable** constitutional challenge to the tax. Pilot allowed that challenge to lapse when it failed to file a timely appeal from the denial of refund, and never demonstrated an interest in pursuing the constitutional challenge which it now

suggests to the Court.

Attempting to avoid responsibility for its failure to pursue an appeal, Pilot now argues that LL&E was obligated to appeal for Pilot. This contention is based solely on the fact that LL&E accommodated Pilot in the first place by filing a petition for refund. The absurd implications of Pilot's position are obvious. Suppose, as is likely, that the initial appeal were unsuccessful. Under Pilot's theory, LL&E would have to forbear collecting until the final denial of writs in the United States Supreme Court.

Pilot bears ultimate responsibility for the tax. Ala. Code §40-17-31(e). Pilot was accordingly the proper party in interest to challenge the tax (assuming that an appeal would be tenable). Consistently with Section 40-17-31(e), the Statement of Appeal Rights (Exhibit H, p. 3) speaks in terms of an appeal by the **taxpayer** and not of the tax **collector**.

CONCLUSION

In line with its original objections to jurisdiction and forum which it has apparently abandoned, Pilot's purpoted constitutional challenge is simply an effort to delay collection of a tax which originated because of Pilot's own failure to license and bond itself. Pilot has demonstrated no authority for shifting this responsibility to LL&E. LL&E prays that its motion for summary judgment be granted, and Pilot's denied, and further delay thus prevented.

/s/John F. Landrum
JOHN F. LANDRUM

CERTIFICATE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Motion for Summary Judgment of Pilot Petroleum Corporation has been served upon all counsel of record by hand delivery this 2nd day of August, 1988.

/s/John F. Landrum
JOHN F. LANDRUM

MTD-R1
10/86

PETITION FOR REFUND OF TAXES

STATE DEPARTMENT OF REVENUE
MISCELLANEOUS TAX DIVISION
MONTGOMERY, ALABAMA 36130

The undersigned hereby makes application for refund of _____
Fifty five thousand seven hundred and ninety and 78/100 Dollars,
($ 55,790.78) for Jet Fuel (type of tax) tax paid by said undersigned
to the State Department of Revenue for the period(s) November, 1986

which amount was erroneously paid, or paid in excess of the amount due, or was paid through mistake of fact or law.

Said amount of tax was erroneously paid by reason of the following stated facts, dates, viz:

In a conversation with Marvin Schram, LL&E was told to c'.arge Pilot Petroleum the AL. Jet Fuel tax on sales made in November, 1986 because Pilot's license was not effective until 12/15/86 and that the bond was not effective until 12/3/86. Therefore, LL&E charged Pilot the tax and subsequently paid it to the state in November, 1986.

In a later conversation with Pilot Petroleum's controller LL&E was told that Pilot's license was issued retroactive therefore Pilot would not pay LL&E the jet fuel tax which had already been paid by LL&E to the state.

Product went to Canada, therefore purchaser claims that it is not taxable.

LL&E Petroleum Marketing, Inc.
Petitioner's Name

P.O. Box 60350
New Orleans, LA 70160
Petitioner's Address

Petitioner's Address

Under penalties of perjury, I declare that the information given in this petition for refund and in accompanying schedules and statements are true, correct and complete to the best of my knowledge and belief.

_____
Authorized Signature

Sworn to and subscribed before me this 21st day of August , 19 87

_____
Notary Public

DEPARTMENTAL USE

Amount Approved $ _____ Date Approved _____
Approved By:

_____
Chief, Miscellaneous Tax Division

See Instructions on Back

White & Yellow-Department of Revenue Pink-Petitioner's Copy

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

SECTION "B" (1)

No. 88-0945

AFFIDAVIT OF PATRICIA A. GODFREY

BEFORE ME, the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, personally appeared Patricia A. Godfrey ("Affiant"), who, having been duly sworn, affirmed as follows:

Affiant is employed as Supervisor of Accounts Payable at The Louisiana Land and Exploration Company ("LL&E"). In December, 1986, Affiant held the position of Product Accountant at LL&E. In that capacity, Affiant was responsible for preparing tax filings to be filed with the State of Alabama, under the supervision of Fred Smith. In these capacities, Affiant has personal knowledge, and knowledge gained from review of records made and maintained in the regular course of LL&E's business, of the matters set forth hereinbelow.

On or about December 18, 1986, Affiant called Marvin Schram, Revenue Examiner for the Alabama Department of Revenue. Affiant and Mr. Schram

discussed the fact that a purchaser of jet fuel, Pilot Petroleum Corp., did not have a license at the time of two jet fuel sales in November, 1986. Affiant explained to Mr. Schram Pilot's belief that its license would be retroactive.

Mr. Schram replied that, according to his records, Pilot had not posted a bond until December 3, 1986, and that a license had not been issued until December 15, 1986.

Mr. Schram further explained that a license can be retroactive to the date of posting of a bond, but cannot be retroactive to a sale occurring before the posting of the bond.

Mr. Schram instructed Affiant to report on LL&E's November, 1986 return the November sales of jet fuel to Pilot, and to pay the excise tax attributable thereto and collect same from Pilot.

New Orleans, Louisiana, this 2nd day of August, 1988.

/s/Patricia A. Godfrey
PATRICIA A. GODFREY

/s/John F. Landrum
JOHN F. LANDRUM
NOTARY PUBLIC

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE LOUISIANA LAND & EXPLORATION COMPANY

v.

PILOT PETROLEUM CORPORATION,

CIVIL ACTION

SECTION "B" (1)

No. 88-0945

SUPPLEMENTAL AFFIDAVIT OF FRED J. SMITH, JR.

BEFORE ME, the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, personally appeared Fred J. Smith, Jr. ("Affiant"), who, having been duly sworn, affirmed as follows:

Affiant is employed by The Louisiana Land and Exploration Company ("LL&E") as Manager, Processing and Marketing Accounting. Affiant is responsible at LL&E for the payment and collection of Alabama State aviation fuel excise taxes. In that capacity, he has personal knowledge, and knowledge gained from review of records made and maintained in the regular course of LL&E's business, of the matters set forth hereinbelow.

Attached hereto is a true copy of the August 21, 1987 Petition for Refund of Taxes which Affiant signed and caused to be filed with the Alabama Department of Revenue.

New Orleans, Louisiana, this 2nd day of August, 1988.

/s/Fred J. Smith, Jr.
FRED J. SMITH, JR.

/s/John F. Landrum
JOHN F. LANDRUM
NOTARY PUBLIC

APPENDIX G

RELEVANT PROVISIONS OF THE UNITED STATES CONSTITUTION

The Import-Export Clause of the Constitution of the United States, Article I, Section 10, Clause 2, states:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws .....

APPENDIX H

The applicable Alabama statutes concerning the need for persons engaging in the business of selling or distributing gasoline in Alabama to first obtain a license from the Alabama Department of Revenue are:

Section 40-12-191, **Code of Alabama 1975**, which states:

> Every distributor, before engaging in the business of selling, distributing or withdrawing from storage gasoline in this state, shall first make application to the department of revenue, upon forms prepared by the department of revenue, for a license to engage in said business. The application shall be executed under oath before a person authorized to take acknowledgements in this state and shall set forth:
>
> (1) The name under which the business will be transacted in this state;
> (2) The location, with street number and address, of the distributor's principal office or place of business;
> (3) The name and complete residence address of the owner, or the names and the addresses of the partners, if a partnership, or the names and addresses of the principal officers, if a domestic corporation, or, if a corporation organized under the laws of another state, the name and address of the authorized agent or agents in this state.

(4) The number of trucks or other vehicles, if any, in which it is proposed to transport gasoline over the public highways in this state; and

(5) The amount of gasoline estimated by distributor which will be sold, distributed or withdrawn from storage monthly.

Section 40-17-31, **Code of Alabama 1975**, is the Alabama statute which levies the gasoline excise tax which is the subject matter of the present action, and states:

> (a) Every distributor, refiner, retail dealer, storer or user of gasoline shall collect and pay over to the state department of revenue an excise tax of $.07 per gallon upon the selling, use or consumption, distributing, storing or withdrawing from storage in this state for any use of gasoline as defined or otherwise referred to in this article, except gasoline sold for use as fuel to propel aircraft and which gasoline is subject to the tax imposed in subsection (d) of this section; and except gasoline sold for use by city and county boards of education, the Alabama Institute for Deaf and Blind, the department of youth services school district, and private and church schools as defined in section 16-28-1, and which offer essentially the same curriculum as offered in grades K-12 in the public schools of this state; provided that where any excise tax imposed by this section upon the sale, use or consumption, distribution, storage, withdrawal from storage in

this state of such gasoline shall have been paid to the state by a distributor, refiner or by any retail dealer, storer or user, such payments shall be sufficient, the intent being that the tax shall be paid to the state but once.

(b) The state department of revenue is hereby authorized to issue to the United States certificates of exemption, upon forms prescribed by the department for use by the United States in purchasing gasoline or other fuels taxed by this section within the state of Alabama and which is paid for by the United States. Any person in reporting and paying the tax to the department may deduct the number of gallons of gasoline or other fuels taxed by this section sold to the United States, as shown by such certificate of exemption duly executed by the United States and filed with such report, and the department is authorized to adopt rules and regulations with respect to the issuance and use of such certificates.

(c) The revenue, less the cost of collection and all refunds authorized by law, obtained from the $.07 excise tax on gasoline, naphtha and other liquid motor fuels, or any device or substitute therefor commonly used in internal combustion engines, as is provided for in this section, shall not be used for any purposes other than the following, namely:

(1) The legislature hereby finds as a fact that of all the gasoline sold in this this state not less than thirty-five one hundredths of one percent

thereof is used for marine purposes to propel vessels on inland and coastal waterways of this state. The legislature hereby declares that it is the policy of this state to use the funds derived from the sale of marine gasoline to improve boating and boating facilities, seafoods and salt water sports fishing in this state. Thirty-five one hundredths of one percent of all state imposed taxes collected on the sale of gasoline (except gasoline and other fuels consumed in airplanes) shall be credited as follows: 60 percent to the state water safety fund of the water safety division and 40 percent to the seafood fund of the seafood division.

(2) The revenue arising from the sale of gasoline as herein defined, except gasoline sold for use as fuel to propel aircraft and which gasoline is subject to the tax imposed in subsection (d) of this section, for all other purposes shall not be used for any purpose other than for the construction, improvement, maintenance and supervision of highways, bridges and streets, including the retirement of bonds for the payment of which such revenues have been or may hereafter be pledged. The payment of the per diem and mileage of members of county governing bodies when engaged in supervising

the construction, improvement and maintenance of highways, bridges and streets, shall be construed as used in supervision; however, the governing body of each county is authorized to expend an amount not to exceed one third of the total amount of such revenue that may be received by such county in the payment of any debt that may have been incurred by such county for the construction or maintenance of roads or bridges. This fund shall be allocated in the manner now provided by law. On the twentieth day of each month following that quarter of any fiscal year, all revenue derived from the sale of gasoline to be consumed in the motor of a boat or vessel as defined in subdivision (1) of this subsection shall be allocated to the state water safety fund and seafood fund.

(d)(1) Every distributor, refiner, retail dealer, storer or user of gasoline or any substitute or device therefor sold for use as a fuel to propel aircraft shall collect and pay over to the state department of revenue an excise tax in accordance with the following schedule upon the selling, use or consumption, distributing, storing or withdrawing

from storage in this state for use as a fuel to propel aircraft:

a. Gasoline or other fuel used to propel aircraft powered by reciprocating engines shall be taxed at the rate of two and seven tenths cents per gallon.

b. Any fuel used to propel aircraft powered by jet or turbine engines shall be taxed at the rate of nine tenths of one cent per gallon.

(2) On July 31, 1977, or as soon thereafter as practicable, and at the same time in every year thereafter, the commissioner of revenue shall determine the total number of gallons of fuel upon which the tax levied in subdivision (1) of this subsection has been reported and paid to the state during the preceding 12-month period, and at the same time he shall ascertain the total net amount of revenue produced by the tax levied thereon. If the net proceeds of the tax for such period amount to more than $650,000.00, the rate of tax shall be reduced in decrements of three tenths of one cent per gallon with respect to the tax levied in paragraph a of subdivision (1) of this subsection and in decrements of one tenth of one cent per gallon with respect to the tax levied in paragraph b of subdivision

(1) of this subsection to the extent required to maintain net collections for such period at a level of $600,000.00. If at any time after such a reduction the rate of tax collections declines to the extent that the $600,000.00 level for a similar 12-month period cannot be maintained, the rate of the tax shall be correspondingly increased in increments of three tenths of one cent per gallon with respect to the tax levied in paragraph a of subdivision (1) of this subsection and increments of one tenth of one cent per gallon with respect to the tax levied in paragraph b of subdivision (1) of this subsection to the extent required to maintain net collections for a similar period at a level of $600,000.00. It is the legislative intent by the above provisions to maintain collections at a $600,000.00 level per annum.

(3) The revenue, less the cost of collection, obtained from the tax levied in subdivision (1) of this subsection shall be paid into the state treasury and be used exclusively for the purpose of paying the cost of acquiring, engineering, construction, improvement and maintenance of existing or proposed airports and other air navigation facilities within the state, for the payment of the

salary of the state director of aeronautics, the salaries of other employees of the Alabama department of aeronautics and for the payment other other administrative and aeronautical expenses of the Alabama department of aeronautics and for the further purpose of creating a sinking fund for the payment of the interest and retirement of the principal of all bonds which may be hereafter lawfully issued, sold and delivered for funds to be used exclusively for the enumerated purposes.

(4) There is hereby exempted from the provisions of subdivision (1) of this subsection and from the excise tax imposed by this section the sale, use or consumption, distribution, storage or withdrawal from storage in this state of gasoline or any other fuel for use as a fuel to propel aircraft of a certificated or licensed air carrier with a hub operation within this state, for use in conducting intrastate, interstate or foreign commerce for transporting people or property by air. For the purpose of this subdivision, the words "hub operation within the state" shall be construed to have all of the following criteria;

a. There originates from the location 15 or more flight de-

partures and five or more different first-stop destinations five days per week for six or more months during the calendar year; and

b. Passengers and/or property are regularly exchanged at the location between flights of the same or a different certificated or licensed air carrier.

(e) Every distributor, refiner, retail dealer or storer of gasoline or other fuels taxed by this section shall add the amount of the excise tax levied and assessed herein to the price of the gasoline or other fuels taxed by this section, it being the purpose and intent of this provision that the tax levied is in fact a levy on the consumer or user with distributor, refiner, retail dealer or storer, or in the case of a licensed user, acting merely as an agent of the state for the collection and payment of the tax to the state.

Section 40-17-32, **Code of Alabama 1975**, provides an exemption from the Alabama Gasoline Excise Tax for sales made by licensed distributors to other licensed distributors, and provides:

> The excise tax imposed by section 40-17-31 shall be collected by persons, as defined in this article, storing gasoline or distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals are for sale or for other use, whether same is used or consumed in this state in any manner or for any purpose or whether such gasoline is withdrawn from storage in this state or not; provided, that sellers of gasoline and its substitutes, paying the tax herein, shall pay the same computed on the basis of their sales and use as herein required, and refiners, storers and distributors shall compute and pay over to the department of revenue this tax on the basis of their withdrawals or distributions or, in the case of a user or consumer, on the basis of the amount of gasoline used or consumed in this state; and provided, that receipts by any licensed distributors or storers from another licensed distributor or storer shall be treated on the same basis as gasoline recieved or distributed by such licensed distributors or storers in interstate commerce.

APPENDIX I

The Tax Injunction Act, codified as Title 28 United States Code, Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.